The Restatement of Torts and Recovery for Loss of the Human-Pet Bond After an Intentional Tort

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I. INTRODUCTION

Owners[1] of pets[2] are often unable to recover for the loss of the human-pet bond when their pets are tortiously injured or killed. However, empirical research confirms the owners may experience the loss as real harm.[3] Pets have an especially important role in a "stressful

1. "Owner" is still the most common term for a pet's human companion. *See* Laurel Lagoni, *Family-Present Euthanasia: Protocols for Planning and Preparing Clients for the Death of a Pet*, *in* PSYCHOLOGY OF THE HUMAN-ANIMAL BOND: A RESOURCE FOR CLINICIANS & RESEARCHERS 181, 181 (Christopher Blazina et al. eds., 2011).

2. For purposes of this Article, the term "pet" means companion animals such as cats and dogs. Admittedly, people keep other animals as pets. *See, e.g.*, Buck Hills Falls Co. v. Clifford Press, 791 A.2d 392, 398 (Pa. Super. Ct. 2002) (deciding chickens were not "household pets" despite owners' claim to the contrary). However, often "those attachments tend to be more distant and may be actively avoided." James A. Serpell, *The Human-Animal Bond*, THE OXFORD HANDBOOK OF ANIMAL STUDIES 1, 81–82 (Linda Kalof ed., 2017). Whether the definition should be expanded for purposes of this analysis is beyond the scope of this Article.

3. *See* Froma Walsh, *Human-Animal Bonds I: The Relational Significance of Companion Animals*, 48 FAM. PROCESS 462, 466–67 (2009) (summarizing studies). Injury to a pet can result in the owner's serious emotional distress with consequential

and frenetic" world characterized by unstable family relationships.[4] Indeed, a 2015 Harris Poll found that 95% of American dog and cat owners regard their pets as family members.[5]

This Article seeks to explain why some courts refuse to allow recovery for loss of the human-pet bond even in cases involving intentional torts, such as conversion or trespass to chattels. Much of the explanation rests with the *Restatement of Torts*.[6] The first and second iterations of the *Restatement of Torts* increased the obstacles pet owners encountered when they sought recovery for emotional harm after an intentional tort. This fact contradicts the common understanding that tort law was expanding during much of the

bodily harm or illness. *See, e.g.*, Liotta v. Segur, No. CV020347756S, 2004 WL 728829, at *1 (Conn. Super. Ct. Mar. 15, 2004) (describing "'physical manifestations of an anxiety attack for which she was taken to the emergency room'"); Kaiser v. United States, 761 F. Supp. 150, 154 (D.D.C. 1991) (claiming post-traumatic stress disorder); *see also* Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 831 (2015) (citing research that emotional injuries "are often as damaging as physical harms").

4. Walsh, *supra* note 3, at 470. *See* David D. Blouin, All in the Family? Understanding the Meaning of Dogs and Cats in the Lives of American Pet Owners (Aug. 2008) (Ph.D. dissertation, Indiana University) (ProQuest).

5. Press Release, More than Ever, Pets are Members of the Family, The Harris Poll #41 (July 16, 2015), https://www.prnewswire.com/news-releases/more-than-ever-pets-are-members-of-the-family-300114501.html. *See* Nicole Owens & Liz Grauerholz, *Interspecies Parenting: How Pet Parents Construct Their Roles*, 43 HUMAN. & SOC'Y 96, 102 (2019); *Differentiating Between Pet Parents and Pet Owners*, PETMD (Aug. 25, 2017), https://www.petmd.com/news/view/differentiating-between-pet-parents-and-pet-owners-36247.

6. Admittedly, this conclusion rests on the widely held belief that the *Restatement of Torts* affects the common law, directly and indirectly. *See, e.g.*, Kenneth W. Simons, *The Role of Tort Theory in the Third Restatement of Torts: An Explanation and Defense*, 52 SW. L. REV. 428, 439–40 (2024) (speaking of "the special influence of ALI projects, especially . . . the *Restatement of Torts*," and noting "A Restatement's black letter rules can be predicted to carry significant or even decisive weight in most of the states and territories of the United States and in federal common law."). *See also* Richard L. Revesz, *Completing the Restatement Third of Torts*, AM. L. INST. (Apr. 3, 2019), https://www.ali.org/news/articles/completing-restatement-third-torts ("The ALI's work on torts arguably has been the most influential of our efforts to restate the common law. Courts have cited to our Torts Restatements more than 80,000 times. No other ALI publication comes close to this mark . . . .").

twentieth century,[7] and that tort law affords make-whole relief to achieve corrective justice.[8] While a recent provision in the *Restatement (Third) of Torts: Remedies* makes clear that such recovery is in fact permissible,[9] this Article explains why the new section may have little effect and what should be done to further clarify the law in this area

Part II briefly describes the law today. It explains that many states, but not all, allow damages for injury to the human-pet bond when a pet is intentionally harmed. Those that allow recovery either recognize parasitic damages for an intentional tort to property (such as conversion or trespass to chattels) or require the plaintiff to prove the tort of intentional infliction of emotional distress ("IIED"). Few states allow recovery for the owner's emotional distress when the harm is negligently inflicted. Courts that deny recovery use the law of remedies to limit the measure of damages and/or constrain liability with restrictive claims.

Part III then recounts how this legal landscape developed, focusing particularly on recovery for loss of the human-pet bond after an intentional tort. It starts with the early common law that predated the first iteration of the *Restatement of Torts* ("*First Restatement*"). Back then, plaintiffs could sometimes recover for injury to the human-pet bond, typically in the intentional tort context and occasionally in the negligence context. But by the time of the *First Restatement*'s drafting, courts were increasingly divided about the availability of such recovery. The *First Restatement* made recovery difficult because it

7. *See* RESTATEMENT OF TORTS: INTEREST § 1 cmt. e (AM. L. INST. 1934) ("The entire entire [sic] history of the development of Tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all."); RESTATEMENT (SECOND) OF TORTS § 1 cmt. e (AM. L. INST. 1965) (same). The RESTATEMENT (THIRD) OF TORTS does not contain that statement. *See also* WILLIAM L. PROSSER, LAW OF TORTS § 53, at 327 (4th ed. 1971) ("Changing social conditions lead constantly to the recognition of new duties."); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 602–03 (1992).

8. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 2 cmt. a (AM. L. INST., Tentative Draft No. 1, 2022) (explaining that all three iterations of the *Restatement* promoted make-whole relief); *id.* § 2 cmt. b (restoring a plaintiff to a "rightful position" is central to corrective justice). *See generally* Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 25–28, 30 (1995).

9. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 (AM. L. INST., Tentative Draft No. 2, 2023).

lacked clarity on the issue and described "value to the owner" ambiguously. The resulting uncertainty laid the groundwork for the *Second Restatement*'s discouragement of parasitic damages in intentional tort cases involving pets.

The *Second Restatement* magnified plaintiffs' difficulty by suggesting that they had to prove the tort of IIED to recover for their mental distress, instead of relying on parasitic damages for conversion or trespass to chattels. The tort of IIED is characterized by strict and ungenerous elements. The *Second Restatement* channeled plaintiffs into this new tort in three ways. It used an illustration for IIED that involved intentional harm to a pet. Its Reporters' Notes omitted important cases that suggested parasitic damages were available. Its commentary repeated confusing language about the value of a chattel. Yet the *Second Restatement* never expressly said that IIED was the only doctrinal path to recovery.

The *Third Restatement* finally clarified the law, although not entirely. For the first time, the *Restatement* states—in section 21 of the *Restatement (Third) of Torts: Remedies*—that a plaintiff can recover emotional distress damages for certain intentional torts that do not cause physical injury (in addition to assault), including property torts.[10] This provision resurrects an approach that was evident at early common law, arguably implicit in the *First Restatement*, and followed by some modern courts. Unfortunately, the new provision is not meant to change the substantive law.[11] Consequently, earlier iterations of the *Restatement* (as well as provisions on liability in other volumes of the *Third Restatement*) may continue to stymie plaintiffs' recovery.

Part IV then makes a few observations. First, it notices that the American Law Institute ("ALI" or "Institute") never achieved its stated aim to clarify and simplify the law in this area, or to promote law that is better adapted to social needs,[12] although section 21 has improved

10. *Id.* § 21(a)(3), (b).

11. *Id.* § 21 reporters' note c.

12. *Certificate of Incorporation*, AM. L. INST. (Feb. 23, 1923), https://www.ali.org/sites/default/files/2024-09/certificate-of-incorporation.pdf (describing the ALI's purpose, *inter alia*, "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice"). *See* Lance Leibman, *Foreword* to CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK, at ix–x (rev. ed. 2015); Richard L. Revesz, *The Debate*

matters. Second, it suggests ways that the Institute's forthcoming work can further its goals. In particular, it recommends the Institute do the following: (1) disentangle the issue of parasitic damages for intentional torts from the issue of a pet's value in negligence cases; (2) defend the line between intentional torts and negligence with respect to permissible recovery for loss of the human-pet bond;[13] (3) discuss how cases of gross negligence fit into the doctrinal structure; (4) clarify that plaintiffs do not need to satisfy the tort of IIED to recover for their emotional harm when there is a conversion or trespass to chattels, assuming the tort was committed under circumstances in which emotional harm is especially likely to result; and (5) reconsider, in a future *Restatement of Torts*, the allocation of decision-making authority between judge and jury in cases covered by the new section 21.

This Article is certainly not the first to examine recovery for loss of the human-pet bond following injury to a pet,[14] but it is the first to

over the Role of Restatements, AM. L. INST. (Aug. 5, 2019), https://www.ali.org/news/articles/debate-over-role-restatements.

13. This recommendation does not require that the Institute defend its particular position on the limited availability of a claim for negligent infliction of emotional distress in the pet context. In fact, I critique the Institute's position in my companion article, *Reconsidering Negligent Infliction of Emotional Distress for Loss or Injury to a Pet*. *See* Merle H. Weiner, *Reconsidering Negligent Infliction of Emotional Distress for Loss or Injury to a Pet*, 88 ALBANY L. REV. (forthcoming 2025).

14. *See, e.g.*, David Favre & Thomas Dickinson, *Animal Consortium*, 84 TENN. L. REV. 893, 894 (2017); Zachary Paterick et al., *A Stepping Stone Toward Companion Animal Protection Through Compensation*, 22 ANIMAL L. 79, 79 (2015); Lauren M. Sirois, Comment, *Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163 UNIV. PA. L. REV. 1199, 1229–30 (2015); Sabrina DeFabritiis, *Barking up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary's Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 238–39 (2012); Logan Martin, Comment, *Dog Damages: The Case for Expanding the Available Remedies for the Owners of Wrongfully Killed Pets in Colorado*, 82 U. COLO. L. REV. 921, 924 (2011); Susan J. Hankin, *Not A Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J. L. & PUB. POL'Y 314, 381 (2007); Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 229–30 (2006); Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 786–87 (2004); William C. Root, Note, *'Man's Best Friend': Property or Family Member? An Examination of the Legal Classification of Companion Animals*

do so by mapping the major doctrinal shifts for intentional wrongdoing in the various iterations of the *Restatement of Torts*.[15] It is also the first to argue that the *Restatement* has contributed to the states' diverse positions, as well as some states' considerable hostility, to recovery for loss of the human-pet bond in intentional tort cases. It also is the first to identify future work for the Institute in this area.

II. CURRENT TORT RECOVERY FOR DESTRUCTION OF THE HUMAN-PET BOND

Although state practice is not uniform, plaintiffs are typically restricted in their ability to recover for the loss of "the human-pet bond"[16] when their pets are injured or killed. The loss of the human-pet bond is comprised of a plaintiff's emotional distress caused by the harm-producing incident as well as the loss of the pet's companionship.

Recovery for the loss of the human-pet bond depends on both the law of damages (often called the law of remedies) and the law of claims (often called the law of liability). Admittedly, this bifurcation between remedies and liability is somewhat arbitrary, and dates to the writ system,[17] but the right doctrinal path can be essential to recovery.[18]

As this section describes, a plaintiff whose pet is negligently injured typically seeks recovery for harm to the human-pet bond through the "value-to-the-owner" measure of damages and/or the tort

and Its Impact on Damages Recoverable for Their Wrongful Death or Injury, 47 VILL. L. REV. 423, 425 (2002).

15. *But see* Jason R. Scott, Note, *Death to Poochy: A Comparison of Historical and Modern Frustrations Faced by Owners of Injured or Killed Pet Dogs*, 75 UMKC L. REV. 569, 575–76 (2006) (lightly touching upon the *Restatement* prior to the *Third Restatement*).

16. *See* John P. Brown & Jon D. Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States*, 215 J. AM. VETERINARY MED. ASS'N 161, 172 (1999) (defining the "human-[pet] bond" as "encompass[ing] the many forms of people's interactions with animals, including companionship, pleasure, fun, physical security and protection, physical health and service").

17. Aaron Belzer, *From Writs to Remedies: A Historical Explanation for Multiple Remedies at Common Law*, 93 DENV. L. REV. F. 1, 7–8 (2016).

18. *See* Zeid v. Pearce, 953 S.W.2d 368, 370 (Tex. Ct. App. 1997) ("Because the Zeids did not plead for damages for the loss of their dog that are recoverable in Texas, the trial court did not err in sustaining Dr. Pearce's special exception and dismissing their cause of action.").

of negligent infliction of emotional distress, usually unsuccessfully. A plaintiff whose pet is intentionally injured typically seeks recovery for harm to the human-pet bond through emotional distress damages that are parasitic to an intentional tort. Some courts, however, require the plaintiff to establish the tort of IIED instead.[19] Other courts reject all avenues of recovery, both claims and damage measures, even in the intentional tort context.

A. The Law of Remedies and the Value of the Animal

Courts typically categorize pets as the plaintiff's property.[20] A successful plaintiff is entitled to the market value, or sometimes the replacement value, of the animal.[21] As an alternative, some courts permit recovery for the "intrinsic value" or "actual value" of the animal.[22] However, this measure, sometimes also called the "value-to-the-owner" measure, usually excludes the owner's pain and suffering

19. *See, e.g.*, Freeman v. Jacobson, No. 20-CV-10040 (SN), 2021 WL 3604754, at *4 (S.D.N.Y. Aug. 13, 2021); Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985); Alvarez v. Clasen, 946 So. 2d 181, 184 (La. Ct. App. 2006). *But see* Pantelopoulos v. Pantelopoulos, 869 A.2d 280, 283–84 (Conn. Super. Ct. 2005) (rejecting that New Jersey or Connecticut recognized the claim of intentional infliction of emotional distress for the defendant's alleged starvation of plaintiff's dog).

20. *See* Kaufman v. Langhofer, 222 P.3d 272, 275 (Ariz. Ct. App. 2009) (noting "the majority position classif[ies] animals as personal property"); *see also* Geordie Duckler, *The Animal as an Object of Value*, ASPATORE 1, at *4 (Jan. 2015) ("The law has always considered dogs to be personal properties . . . ."). Occasionally, courts suggest pets may be acquiring a new status. *See, e.g.*, Hardy v. Flowers, No. HHDCV205065186, 2021 WL 929946, at *3 n.2 (Conn. Super. Ct. Feb. 16, 2021) (mentioning the "slow evolution towards the 'de-chattelization' of household pets"); *Finn v. Anderson,* 101 N.Y.S.3d 825, 828 (City Ct. 2019).

21. *See, e.g.*, Carbasho v. Musulin, 618 S.E.2d 368, 371 (W. Va. 2005) (negligence claim); Soucek v. Banham, 524 N.W.2d 478, 481 (Minn. Ct. App. 1994) (intentional tort claim); Capable Canines of Wis. v. Greene, No. 2018AP510, 2019 WL 969582, at *4 (Wis. Ct. App. Feb. 28, 2019) (allowing replacement value of service dog). *See generally* Robin Cheryl Miller, *Damages for Killing or Injuring Dog*, 61 A.L.R. 5th 635, § 2 (1998) (discussing the different methods used to determine the recovery for an individual whose dog was killed or injured).

22. *See* Adam P. Karp, *Cause of Action in Intentional Tort for Loss of or Injury to Animal by Human*, 44 CAUSES OF ACTION 2D 211 § 12 (2025). *But see* Liddle v. Clark, 107 N.E.3d 478, 484 (Ind. Ct. App. 2018) (refusing to use value-to-the-owner measure).

or the loss of the pet's companionship,[23] although not always.[24] Instead, this measure typically compensates for the plaintiff's special investment in the pet, such as immunizations or special training.[25]

Most courts recognize that pets are a special type of property because they can suffer pain. Therefore, plaintiffs can often recover the reasonable costs of veterinary care to save or treat the animal.[26] At times, the cost of reasonable veterinary care can greatly exceed the market value of the pet.[27] Judges reason that the award is necessary to stop people from acting inhumanely by ignoring an animal's

23. *See* Alison M. Rowe, *Survey of Damages Measures Recognized in Negligence Cases Involving Animals*, 5 KY. J. EQUINE, AGRIC. & NAT'L RES. L. 249, 251, 255–57 (2013) (describing the market-value calculation as the approach that "[m]ost jurisdictions use"). *See, e.g.*, Shera v. N.C. State Univ. Veterinary Teaching Hosp., 723 S.E.2d 352, 357–58 (N.C. Ct. App. 2012); Sherman v. Kissinger, 195 P.3d 539, 547 (Wash. Ct. App. 2008); McDonald v. Ohio State Univ. Veterinary Hosp., 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994); Daughen v. Fox, 539 A.2d 858, 864 (Pa. Super. Ct. 1988); Stettner v. Graubard, 368 N.Y.S.2d 683, 685 (Town Ct. 1975).

24. *See* Mercurio v. Weber, No. SC1113/03, 2003 WL 21497325, at *2 (E.D.N.Y. June 20, 2003); Saathoff v. Davis, No. 13-CV-2253, 2015 WL 13307406, at *6 (C.D. Ill. June 29, 2015) (relying on Illinois law). Some states' law is unclear. *See, e.g.*, Amy Lombardo, *Idaho Law Regarding the Measure of Damages for Animals Need Not be Revisited*, 56 ADVOC. 51, 51 (2013) (discussing disagreement with Adam Karp about Idaho law). Some have allowed compensation for sentimentality so long as it is not excessive or unusual. *See* Adam Karp, *How the Law Values Our Animal Companions*, 56 ADVOC. 50, 52–53 (2013) (citing the Washington Supreme Court); *see, e.g.*, *Mieske v. Bartell Drug Co.,* 593 P.2d 1308, 1311 (Wash. 1979); Sherman v. Kissinger, 195 P.2d 539, 549 (Wash. Ct. App. 2008) (citing *Mieske*); *Brousseau v. Rosenthal,* 443 N.Y.S.2d 285, 286 (Civ. Ct.1980); *cf.* Jankoski v. Preiser Animal Hosp., 510 N.E.2d 1084, 1086 (Ill. Ct. App. 1987) (approving of *Mieske* and *Brousseou* and implying that a type of limited recovery might be permissible).

25. *See, e.g.*, Strickland v. Medlen, 397 S.W.3d 184, 193 n.58 (Tex. 2013); Mitchell v. Heinrichs, 27 P.3d 309, 313–14 (Alaska 2001); McDonald v. Ohio State Univ. Veterinary Hosp., 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994).

26. *See* Barking Hound Vill., LLC v. Monyak, 787 S.E.2d 191, 195–97 (Ga. 2016) (noting this is "the position taken by courts in a majority of states"); *see, e.g.*, Blue Pearl Veterinary Partners, LLC v. Anderson, 888 S.E.2d 783, 787 (Va. Ct. App. 2023); Martinez v. Robledo, 147 Cal. Rptr. 3d 921, 922 (Ct. App. 2012); Leith v. Frost, 899 N.E.2d 635, 639, 641 (Ill. Ct. App. 2008); Burgess v. Shampooch Pet Indus., Inc., 131 P.3d 1248, 1253 (Kan. Ct. App. 2006); Zager v. Dimilia, 524 N.Y.S.2d 968, 969 (Village Ct. 1988).

27. *See, e.g.*, *Blue Pearl Veterinary*, 888 S.E.2d at 786; Irwin v. Degtiarov, 8 N.E.3d 296, 300–02 n.12 (Mass. App. Ct. 2014); Kimes v. Grosser, 126 Cal. Rptr. 3d 581, 585–86 (Ct. App. 2011).

suffering.[28] "[T]he owner's affection for the animal" can be relevant when assessing the reasonableness of the expense,[29] even if emotional distress damages are generally unavailable.

B. The Law of Liability and Mental Distress Damages

Whether a plaintiff can get damages for the pet's "intrinsic value" is a separate issue from, but related to, whether a plaintiff can get damages directly for emotional harm.[30] Plaintiffs are least likely to recover mental distress damages for their loss of the human-pet bond when a defendant negligently harms the pet, as opposed to commits an intentional tort like conversion or trespass to chattels. Emotional distress damages are rare when a defendant negligently injures property,[31] even a pet.[32] Courts sometimes proclaim that damages for

28. *Barking Hound Vill.*, 787 S.E.2d at 196.

29. Sonja Larsen, *Measure of Damages for Injuries to Pets*, 4 AM. JUR. 2D ANIMALS § 116 (2024). *See, e.g.*, *Irwin*, 8 N.E.3d at 301; Hyland v. Borras, 719 A.2d 662, 664 (N.J. Sup. Ct. App. Div. 1998).

30. Anzalone v. Kragness, 826 N.E.2d 472, 477–78 (Ill. App. Ct. 2005); La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964) (noting an "affinity" between the two ideas).

31. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. m (AM L. INST. 2012).

32. *See generally* Bruce A. Wagman & Jayne M. DeYoung, *Actions Involving Injuries to Animals*, 90 AM. JUR. PROOF OF FACTS 3d § 22 (2024) ("[M]ost jurisdictions maintain . . . there can be no recovery of emotional distress damages resulting from an animal's negligent destruction."); W. E. Shipley, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R.2D 1070, § 2 (1953); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. m. (citing authority); *see*, *e.g.*, Repin v. State, 392 P.3d 1174, 1185 (Wash. Ct. App. 2017); *Barking Hound Vill.*, 787 S.E.2d at 195; Strickland v. Medlen, 397 S.W.3d 184, 191–92 (Tex. 2013); Naples v. Miller, No. 08C-01-093 PLA, 2009 WL 1163504, at *3 (Del. Super. Ct. Apr. 30, 2009); Kondaurov v. Kerdasha, 629 S.E.2d 181, 186–87 n.4 (Va. 2006); Pacher v. Invisible Fence Dayton, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003); Lockett v. Hill, 51 P.3d 5, 7–8 (Or. Ct. App. 2002); Facler v. Genetzky, 595 N.W.2d 884, 892 (Neb. 1999). *But see* Johnson v. Wander, 592 So.2d 1225, 1225 (Fla. Dist. Ct. App. 1992) (gross negligence); Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1070–71 (Haw. 1981); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Ct. App. 1978) (gross negligence); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 326–27 (Or. 1982).

emotional harm are simply not available,[33] even if a plaintiff could satisfy the elements of the tort of negligent infliction of emotional distress.[34] When that tort is an option, recovery is closely circumscribed with a variety of requirements,[35] and plaintiffs seldom prevail. For example, courts often find that the owner was not in the "zone of danger,"[36] or the injured pet is not "family,"[37] or the plaintiff and defendant lack the required relationship.[38]

In contrast, plaintiffs can generally recover emotional distress damages for loss of the human-pet bond if the defendant commits an intentional tort that injures the pet. The tort is typically trespass to chattels or conversion.[39] Nonpecuniary recovery is allowed because

33. *See, e.g.*, Strickland v. Medlen, 397 S.W.3d 184, 188–89 (Tex. 2013); Bales v. Judelsohn, No. 2005-UP-509, 2005 WL 7084365, at *1 (S.C. Ct. App. Aug. 30, 2005); Kennedy v. Byas, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004); Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001); Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691–92 (Iowa 1996); Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985).

34. *See, e.g.*, Cardenas v. Swanson, 531 P.3d 917, 920 (Wyo. 2023); Mulvaney v. Rodriguez, No. CV206061430S, 2021 WL 2014819, at *1–2 (Conn. Super. Ct. Apr. 26, 2021); *Kennedy*, 867 So. 2d at 1197; Krasnecky v. Meffen, 777 N.E.2d 1286, 1289–90 (Mass. App. Ct. 2002); Strawser v. Wright, 610 N.E.2d 610, 612 (Ohio Ct. App. 1992); Roman v. Carroll, 621 P.2d 307, 308 (Ariz. Ct. App. 1980). *But see* Vaneck v. Cosenza-Drew, No. MMXCV085003942S, 2009 WL 1333918, at *2–4 (Conn. Super. Ct. Apr. 20, 2009).

35. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM §§ 47, 48 (AM. L. INST. 2012).

36. *See, e.g.*, Naples v. Miller, No. 08C-01-093 PLA, 2009 WL 1163504, at *3 (Del. Super. Ct. Apr. 30, 2009).

37. *See, e.g.*, Miller v. Nye Cnty., 488 F. Supp. 3d 973, 975–76, 982 (D. Nev. 2020); McDougall v. Lamm, 48 A.3d 312, 314 (N.J. 2012).

38. Petco Animal Supplies, Inc., v. Schuster, 144 S.W.3d 554, 562 (Tex. Ct. App. 2004).

39. Levy v. Only Cremations for Pets, 271 Cal. Rptr. 3d 250, 258 (Ct. App. 2020); Repin v. State, 392 P.3d 1174, 1185 (Wash. Ct. App. 2017); Plotnick v. Meihaus, 146 Cal. Rptr. 3d 585, 600 (Ct. App. 2012); Sexton v. Brown, No. 61363-4-I, 2008 WL 4616705, at *7 (Wash. Ct. App. Oct. 20, 2008); Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996); Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985); Peloquin v. Calcasieu Par. Police Jury, 367 So. 2d 1246, 1251 (La. Ct. App. 1979); Fredeen v. Stride, 525 P.2d 166, 170 (Or. 1974); Lincecum v. Smith, 287 So. 2d 625, 629 (La. Ct. App. 1973); Levine v Knowles, 197 So. 2d 329, 331 (Fla. Ct. App 1967); Brown v. Crocker, 139 So. 2d 779, 781 (La. Ct. App. 1962).

emotional distress damages are seen as parasitic to an intentional tort (even for harm to property[40]) when the defendant acts with sufficient moral culpability, such as maliciously.[41] However, sometimes a jurisdiction restricts recovery for emotional harm unless the plaintiff can satisfy the elements of the standalone claim for emotional harm, i.e., an IIED claim,[42] and often this can be difficult.[43]

Occasionally, plaintiffs try to claim emotional distress damages for the "wrongful death" of a pet, but courts typically reject these claims because wrongful death claims are a creature of statute. The statutes do not identify pets as family.[44]

Although most states' common law defines the parameters of recovery, a few states have statutes that address the topic. These statutes tend to limit recovery, not expand it.[45] At least one state expressly *excludes* pain and suffering for the injury or death of a pet.[46] Other states identify categories of permissible damages and omit damages for pain and suffering.[47] Courts sometimes interpret ambiguous statutes to exclude such damages.[48] While a few statutes explicitly allow nonpecuniary damages, they typically cap damages at low amounts.[49]

40. *See* Gomsrud v. Campeau, 31 Wash. App. 2d 1025 (Wash. Ct. App. 2024); Plotnik v. Meihaus, 146 Cal. Rptr. 3d 585, 601 (Ct. App. 2012); La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964).

41. *See* Womack v. Von Rardon, 135 P.3d 542, 543 (Wash. Ct. App. 2006); *La Porte*, 163 So. 2d at 269.

42. *See supra* note 19.

43. *See infra* notes 504–23 and accompanying text.

44. *See, e.g.*, Krasnecky v. Meffen, 777 N.E.2d 1286, 1289–90 (Mass. App. Ct. 2002); Harabes v. Barkery, Inc., 791 A.2d 1142, 1145 (N.J. Sup. Ct. 2001); Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084, 1085–86 (Ill. Ct. App. 1987).

45. *See, e.g.*, CAL. FOOD & AGRIC. CODE § 31103 (2022) (Seizure or killing dog entering place where livestock or poultry confined).

46. NEV. REV. STAT. § 41.740(1)(a)–(d) (2018).

47. *See, e.g.*, CONN. GEN. STAT. ANN. § 22-351a (West 2021); LA. STAT. ANN. § 46:1956(c) (2021).

48. *See* Anne Arundel Cnty. v. Reeves, 252 A.3d 921, 928 (Md. App. Ct. 2021) (interpreting MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (2021)).

49. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (2017) ($10,000 limit); TENN. CODE ANN. § 44-17-403(a)(1) (West 2021) ($5,000 limit unless the claim is intentional infliction of emotional distress). *But see* 510 ILL. COMP. STAT.

C. The Occasional Absence of Any Helpful Law Despite an Intentional Tort

Some states disallow recovery for loss of the human-pet bond even in intentional tort cases.[50] The 2010 *Scheele* case is a good example and warrants an extended description. Sarah and Denis Scheele sued Lewis Dustin for killing their pet dog, Shadow.[51] The Scheeles had stopped at a church parking lot for a break from their travels and let Shadow off his leash.[52] Shadow wandered onto the adjacent property where the defendant was shooting squirrels, unbeknownst to the Scheeles. The defendant took aim at Shadow even though the dog was not aggressive or threatening in any way. The bullet hit Shadow, causing the dog to hemorrhage and die. The Scheeles witnessed Shadow's pain and death. They claimed they suffered "severe emotional distress manifested by recurring nightmares, sleeplessness, periods of sadness, and physical stress" as well as harm from "the destruction of the special relationship that each had with Shadow," defined by "solace, affection, friendship[,] and love."[53]

The Scheeles prevailed in the litigation but recovered only $155, exclusively for economic damages. The trial court held that Vermont's law disallowed recovery for a pet owner's emotional distress or for the loss of companionship.[54] Consequently, the trial judge denied each plaintiff's request for $1,500 for emotional distress damages and another $1,500 for the loss of companionship. The court also rejected the plaintiffs' request to create a new "cause of action for the wrongful killing of a pet dog."[55]

The Supreme Court of Vermont affirmed, holding that the law did not permit compensation for the loss of the human-pet bond. It recognized "plaintiffs had a strong emotional bond with their dog and

ANN. § 70/16.3 (West 2021) (allowing damages for emotional distress but limiting punitive damages to $25,000).

50. *See, e.g.*, Ammon v. Welty, 113 S.W.3d 185, 187–88 (Ky. Ct. App. 2002); Johnson v. Douglas, 723 N.Y.S.2d 627, 628 (N.Y. 2001).

51. Scheele v. Dustin, 998 A.2d 697, 698 (Vt. 2010).

52. *Id.*

53. *Id.* at 698–99.

54. *Id.* at 699.

55. *Id.* at 702–03.

have suffered by Shadow's untimely death."[56] It acknowledged that the damages were insufficient because a dog's worth comes from its relationship with its human, not from its market price.[57] The court claimed that Vermont's view—that pets were property—was typical of the law in most states,[58] and recovery for emotional distress was inappropriate.

In speaking about the law of damages, the court held that damages were to be computed the same as for any other item of personal property: "the property's value before the injury less the value after the injury."[59] Even if the value-to-the-owner measure might be appropriate, the plaintiff's request for $1,500 for loss of companionship would not fall within it.[60] Nor was the court receptive to recognizing parasitic damages for the intentional tort. While it thought punitive damages might be appropriate,[61] it refused to say the defendant's conduct qualified,[62] and noted that the Scheeles waived this relief pretrial anyway.[63]

The plaintiffs did not raise a standalone claim for emotional harm. However, the court cited a case that said the intentional shooting of a dog on its own was insufficient to satisfy the tort of IIED unless the defendant intended to inflict emotional distress on the owner by the shooting.[64] Likewise, the court cited an earlier Vermont case that rejected a claim for negligent infliction of emotional distress when the defendant's acts were directed at a pet and did not put the plaintiff's safety at risk.[65] In sum, the Scheeles were unable to recover for the loss of the human-pet bond following Shadow's death.

56. *Id.* at 704.

57. *Id.* at 700.

58. *Id.*

59. *Id.*

60. *Id.* at 700–01.

61. *Id.* at 701.

62. *Id.* at 701 n.1.

63. *Id.* at 699.

64. *Id.* at 702 (citing Rabideau v. City of Racine, 627 N.W.2d 795, 803 (Wis. 2001)).

65. *See id.* at 700–01 (citing Goodby v. Vetpharm, Inc., 974 A.2d 1269, 1274 (Vt. 2009) ("[P]laintiffs cannot recover for NIED because they were never the objects of the allegedly negligent acts of the veterinarians and pharmacy, and thus were neither in physical danger themselves, nor had any reason to fear for their own

III. HOW THE RESTATEMENT OF TORTS SHAPED THE LAW

The *Restatement of Torts* is responsible for the diversity of approaches that exist as well as some jurisdictions' outright hostility to recovery for the loss of the human-pet bond. In various ways, the *First* and *Second Restatement* eroded those parts of the earlier common law that had benefited plaintiffs: the recognition that pets had special emotional value to their owners, that juries could be trusted to award the right amount of damages, and that intentional or grossly negligent harm to a chattel justified damages for the owner's emotional harm.

A. The Common Law Prior to the First Restatement

People have kept animals as pets from at least as early as the 1800s.[66] The book *Pets in America* details the remarkably rich history of the family pet and demonstrates people's love for their pets.[67] Among other things, pets were frequently portrayed in family portraits.[68] In 1889, the California Supreme Court recognized with respect to dogs that "there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt."[69] In 1923, the Utah Supreme Court spoke approvingly of the "general, well-nigh universal . . . recognition [in the literature of the ages] of the bond between man and his most capable, loyal, and loving slave, servant, and companion . . . ."[70] People who loved their pets presumably suffered loss of the human-pet bond when their pets were injured or killed. Lord Bryon's famous eulogy about Botswain suggests as much.[71]

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physical well-being."). The *Goodby* court did not rule that such a claim would always be unavailable, but that the facts did not support the doctrinal requirements.

66. Alicia Ault, *Ask Smithsonian: When Did People Start Keeping Pets?*, SMITHSONIAN MAG., Sept. 28, 2016.

67. KATHERINE C. GRIER, PETS IN AMERICA: A HISTORY (2006).

68. *Id.* at 21–22.

69. Johnson v. McConnell, 22 P. 219, 220 (Cal. 1889).

70. Pardee v. Royal Baking Co., 221 P. 847, 848 (Utah 1923).

71. Near this Spot
are deposited the Remains of one
who possessed Beauty without Vanity,
Strength without Insolence,
Courage without Ferosity,

1. A Pet's Value

While at one time there was some question about whether animals were even "property" for which an owner could receive any compensation in tort law,[72] by the late 1800s pets were considered property and the owner could sue for trespass to chattels, conversion, or negligence if the pet was injured or killed.[73] The U.S. Supreme Court recognized this fact in the 1897 case, *Sentell v. New Orleans & R.R. Co*.[74] There the plaintiff, whose pregnant Newfoundland had been negligently killed by a railroad car when the dog inadvertently stepped on the track, challenged a law in Louisiana that required dogs to be placed on the tax rolls before permitting tort recovery for harm to them and then limiting any recovery to the owner's declared value.[75] Initially, a jury had awarded the plaintiff $250, but the court of appeals reversed the award because the plaintiff could not show compliance with the law.[76] In upholding the law as being within the police power of the state, the Court noted the availability of the claim: "By the common law, as well as by the law of most, if not all, the states, dogs

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> and all the virtues of Man without his Vices.
> This praise, which would be unmeaning Flattery
> if inscribed over human Ashes,
> is but a just tribute to the Memory of
> Boatswain, a DOG
> who was born in *Newfoundland* May 1803
> and died at *Newstead* Nov. 18th, 1808.

George Gordon Byron, *Epitaph to a Dog*, POETS.ORG, https://poets.org/poem/epitaph-dog (last visited Apr. 12, 2025). *See* PERSON OF QUALITY, A FUNERAL ORATION UPON FAVORITE, MY LADY LAP-DOG 11 (1699). Today, a pet's importance is sometimes captured when the pet is listed as a survivor in a person's obituary. *See generally* Cindy Wilson et al., *Companion Animals in Obituaries: An Exploratory Study*, 26 ANTHROZOÖS 227, 234 (2015).

72. Some argued that animals were not property until they were made the subject of larceny. For example, see the defense counsel's argument in Brown v. Hoburger, 52 Barb. 15, 22 (N.Y. Sup. Ct. 1868).

73. However, some states did not allow suits for negligently inflicted injury. *See, e.g.*, Columbus R. Co. v. Woolfolk, 58 S.E. 152, 153 (Ga. 1907).

74. Sentell v. New Orleans & Carrollton R.R. Co., 166 U.S. 698, 700 (1897). Actions for the death of a dog were evident in England well before then. *See, e.g.*, Dand v. Sexton, 100 Eng. Rep. 442, 442 (1789).

75. *Sentell*, 166 U.S. at 700.

76. *Id.* at 698.

are so far recognized as property that an action will lie for their conversion or injury . . . ."[77]

Once liability was established, juries had to determine the plaintiff's damages and that depended upon the animal's value.[78] Plaintiffs often put on evidence of the animal's qualities to establish its value.[79] The Supreme Court in *Sentell* noted the difficulty of the jury's task, i.e., the difficulty of distinguishing between "the valuable and the worthless" dog, and suggested that the human-pet bond was part of the equation.[80] The Court explained:

> While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, *for their natural companionship with man*, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance.[81]

In fact, prior to *Sentell*, state courts permitted plaintiffs to testify specifically about the human-pet bond. For example, the Supreme Court of Pennsylvania, in *Lentz v. Stroh*,[82] described the argument of the plaintiff's attorney to the jury. In that case, the plaintiff sued the defendants for killing his dog and was originally awarded $11 by an arbitrator.[83] It was retried in court, and the plaintiff won only "six cents

77. *Id.* at 700.

78. *See, e.g.*, Meneley v. Carson, 55 Ill. App. 74, 75 (App. Ct. 1893); Heiligmann v. Rose, 16 S.W. 931, 931 (Tex. 1891); State v. M'Duffie, 34 N.H. 523, 526–27 (1857).

79. Gulf, C. & S.F. Ry. Co. v. Blake, 95 S.W. 593, 594 (Tex. Civ. App. 1906); *Meneley*, 55 Ill. App. at 75; *Heiligmann*, 16 S.W. at 932; Cantling v. Hannibal & St. J.R. Co., 54 Mo. 387, 391 (1873); *M'Duffie*, 34 N.H. at 526–27.

80. *Sentell*, 166 U.S. at 701.

81. *Id.* (emphasis added).

82. Lentz v. Stroh, 6 Serg. & Rawle 34, 38 (Pa. 1820). Plaintiffs could typically recover for veterinary expenses, but they usually were not greater than the market value of the animal. *See, e.g.*, Ellis v. Hilton, 43 N.W. 1048, 1048–49 (Mich. 1889). *See generally* THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 603, at 680 (2d ed. 1870).

83. *Lentz*, 6 Serg. & Rawle at 38.

damages, together with the costs."[84] The Supreme Court of Pennsylvania affirmed that award, finding the trial court had properly admitted evidence that the dog went after sheep,[85] as this was relevant to "the real value of the dog" and damages.[86] Here the appellate judge suggests, incidentally, how the human-pet bond was also relevant to damages:

> The plaintiff, to swell the damages, had given evidence of the many excellent qualities of the dog; a first[-]rate hunting dog, worth a cow, and that the plaintiff would as soon have lost the best horse in his stable, which had cost him one hundred and twenty dollars. The value of the dog was a proper inquiry; the evidence given by the plaintiff, was all proper; but shall not the defendant, on the general issue, be permitted to contradict this evidence; to say, I never did kill him, although the law authorized me so to do; but the dog was a most worthless cur, a most mischievous animal, not employed in destroying the wild beasts of the forest, but entering into the fields of his master's neighbours, and destroying their sheep; that he was a wolf in the clothing of a dog; a *caput lupinum*, and instead of being of the value of fifty dollars, as the plaintiff states in his writ, he was really of no value beyond the value of his skin; that the whole evidence of the value of the dog is not true, and I will prove it by his own confession? The evidence did not rest on the act of assembly; was not by way of justification; but on the common law, by showing the real value of the dog; *and if the owner had placed his affections on him, he had placed them, not on the noble animal, a faithful dog, a friend and companion; for the counsel have in such vivid colours represented him to us*; but on the vilest cur that ever cut the throat of a sheep, or sucked his blood.[87]

84. *Id.* at 35.

85. *Id.* at 43.

86. *Id.* at 42.

87. *Id.* at 42–43 (emphasis added).

In *Blauvelt v. Cleveland*, the appellate court specifically noted the value of the dog to the family as a pet: "While it appears that the dog had no market value, he was nevertheless of substantial value to the plaintiff, as appears by the evidence. He drove the cows from the pasture to the stable, guarded the calves, caught the hogs and did many other things of service to his master. In short, he was a well-trained, good-natured, serviceable dog, *and a great pet of the family*."[88]

Even when the animal was not obviously a pet, it could provide services to the family that contributed to their emotional tranquility. The jury would hear about the importance of the animal's role. For example, in *McCallister v. Sappingfield*, the plaintiff testified about the value of his Scotch collie dog who had been shot by the defendant.[89] Not only was the dog a "very useful" farm dog who "was exceptionally bright, and would mind instantly," and excellent at herding cattle, but it was a protector of his wife when he was out of town.[90] The court noted the "true rule" that even if a dog has "no market value, [the owner] may prove its special value to him by showing its qualities, characteristics and pedigree, and may offer the opinions of witnesses who are familiar with such qualities."[91] In discussing the value of dogs, generally, it noted, "They are the negro's *associates*, and often his only property, the poor man's *friend*, and the rich man's *companion*, and the protection of women and children, hearthstones and henroosts."[92] Similarly, in *Heiligmann v. Rose*,[93] in affirming the damage award for the plaintiff for the malicious poisoning of five of his Newfoundland dogs, the court noted, "The dogs were of fine breed and well trained, and one of the Newfoundland dogs was trained to signal the arrival of any person at appellee's, who could tell from his bark if the person was man, woman, or child."[94]

88. Blauvelt v. Cleveland, 190 N.Y.S. 881, 883 (App. Div. 1921) (emphasis added); *see* Coolidge v. Choate, 52 Mass. 79, 84 (1846) ("The measure of damages, which the plaintiff was entitled to recover, was what the [game] cocks were worth to him as articles of merchandize or sale, whether the market for them was to be found in this Commonwealth or elsewhere.").

89. McCallister v. Sappingfield, 144 P. 432, 434 (Or. 1914).

90. *Id.* at 433.

91. *Id.* at 434.

92. *Id.* at 433 (emphasis added).

93. Heiligmann v. Rose, 16 S.W. 931, 932 (Tex. 1891).

94. *Id.*

While some modern courts interpret these earlier cases as equating "special value to the owner" with the dog's economic value,[95] that interpretation is too grudging. Not only did courts say a plaintiff could prove "special *or* pecuniary value to his owner,"[96] but courts admitted evidence about the animal's emotional value as a pet, as demonstrated above.[97] Consequently, owners regularly testified about the animal's value to him or her.[98] In *Chalker v. Raley*, albeit later in time, the jury heard testimony from the owner, a 12-year-old boy, that, "[t]he dog was worth $100, but I would not have taken that for him. I got him when he was a puppy and had had him about seven or eight months. He was a very valuable dog[,] and I thought a lot of him."[99] Occasionally plaintiffs suggested, unsuccessfully, that the animal's value even included its emotional value to others too.[100]

Perhaps this evidence was about the pet's "economic" value to the extent that it reflected what the plaintiff would have charged the defendant to buy the pet. But, as suggested in the following quotation, the sale's price would have captured the value of the human-pet bond. A late nineteenth century damages treatise discussed the value-to-the-

95. Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 561 (Tex. Ct. App. 2004).

96. Hodges v. Causey, 26 So. 945, 946 (Miss. 1900) (emphasis added).

97. *See supra* notes 81–94 and accompanying text.

98. *See* Bowers v. Horan, 53 N.W. 535, 536 (Mich. 1892) (analogizing animals to land, "[o]ne may testify to the value of land, although it has no market value"); Missouri Pac. R. Co. v. Chase, 23 S.W.2d 256, 257 (Ark. 1930) (showing that the appellee testified to the hunting dog's value); *cf.* CHARLES G. ADDISON, A TREATISE ON THE LAW OF TORTS OR WRONGS AND THEIR REMEDIES 602 (William E. Gordon & Walter H. Griffith eds., 8th ed. 1906) ("But, where the value of the article lies peculiarly within the knowledge of the plaintiff, he should prove the value of it, in order to enable the jury to make a correct assessment of the damages. Thus, when he sues for the detention of letters and documents, he should prove the nature of the letters, and of what use they were to him."). Other witnesses could also testify about an animal's qualities that undoubtedly mattered *both* to the animal's economic value *and* its emotional value to the owner. *See, e.g.*, Dunlap v. Snyder, 17 Barb. 561, 565–66 (N.Y. Gen. Term 1854) (reporting witness testimony about whether the dog was vicious or quiet).

99. Chalker v. Raley, 37 S.E.2d 160, 162 (Ga. Ct. App. 1946).

100. *See* Dreyer v. Cyriacks, 112 Cal. App. 279, 284–85 (Dist. Ct. App. 1931) (finding trial court's award of $100,000 for compensation and $25,000 for punitive damages greatly excessive despite argument that the movie star dog "lived and struggled, suffered and sacrificed, to make countless thousands happy and cheerful").

owner measure. It cited with approval the view expressed in *Parsons on Contracts*, which stated that damages had to reflect the "price of affection." It continued,

> We think it quite clear, however, that this *pretium affectionis* cannot be recovered, unless in case where the conversion or appropriation by the defendant was actually tortious, and in that case we should be disposed to hold that the defendant should be made to pay what he would have been obliged to give if he had bought the article, or at least that the damages might be considerably enlarged in such a case on the principle of exemplary damages.[101]

While the passage from the damage treatise suggested the value-to-the-owner measure was appropriate in cases involving willful and wrongful behavior, and courts agreed,[102] the availability of that measure did not depend upon the claim. As stated by treatise writer Dean Hugh Willis, "Whenever value measures the damages recoverable, it is on the theory of compensation. No difference in the amount of damages can be predicated on the nature of the action, or the fact of intent on the part of the wrongdoer."[103] Consequently, testimony regarding the value of the animal was appropriate in cases alleging either an intentional tort or negligence.

The appropriateness of this measure for a negligence claim, and the appropriateness of the plaintiff's testimony on the issue, was evident in *Sentell v. New Orleans & R.R. Co*., the Supreme Court case

101. WILLIAM B. EGGLESTON, A TREATISE: THE LAW OF DAMAGES, at 247 (1880) (citing THEOPHILUS PARSONS, CONTRACTS 196 (2d ed. 1853)); *see* GEORGE W. FIELD, A TREATISE ON THE LAW OF DAMAGES § 817, at 649–50 (1876) (also discussing Parsons's stance on the subject); *infra* notes 245–68 and accompanying text (showing exemplary damages were used to compensate pain and suffering).

102. *See, e.g.*, Whitfield v. Whitfield, 40 Miss. 352, 366–67 (1866) ("[W]here the trespass, detention, or conversion, is attended by circumstances of malice, fraud, oppression, or willful wrong, the law abandons the rule of compensation, in a legal sense, and the measure of damages becomes a matter for the consideration of the jury, guided by the evidence before them.").

103. HUGH EVANDER WILLIS, PRINCIPLES OF THE LAW OF DAMAGES § 27, at 79 (1912).

discussed above.[104] Another good example is *Citizens' Rapid-Transit v. Dew*.[105] There the Tennessee Supreme Court affirmed a judgment against a streetcar that negligently injured a dog.[106] The parties disagreed about the relevance of evidence characterizing the dog's pedigree.[107] The court held that the dog's pedigree was relevant but noted that the jury did not base its award on such evidence in assessing value, but rather relied on the plaintiff's own assessment, which included the value of the dog as a companion.[108] In allowing the award of $250 to stand, the court noted the following:

> The plaintiff fixes the value of the dog at $250, without any reference to his blood or lineage, and in this he is sustained. He describes him as a handsome dog, very fast, wide ranger, very staunch on his game and to the gun, thoroughly broken, a fine retriever from land or water, with an excellent disposition. *He is shown also to have been a valuable, reliable yard and house dog, and to have made himself generally useful and almost indispensable to the plaintiff's household*. With such an eloquent recital of the dog's qualities, the jury could not, perhaps, have given less damages than $250.[109]

In *Flowerree v. Thornberry*,[110] the owner alleged negligence as well as an intentional tort, although no evidence of the latter existed, and then testified that his fox hound, Lip, was "well trained, very fast, of keen scent and high degree."[111] The appellate court referenced "the superior excellence of 'Lip,' *as affectionately testified to by her owner*."[112]

104. *See supra* notes 74–77, 80–81 and accompanying text.

105. Citizens' Rapid-Transit Co. v. Dew, 45 S.W. 790, 792 (Tenn. 1898).

106. *Id.* at 793.

107. *Id.* at 791.

108. *Id.* at 792.

109. *Id.* (emphasis added); *see also* Heiligmann v. Rose, 16 S.W. 931, 932 (Tex. 1891).

110. Flowerree v. Thornberry, 183 SW 359, 361 (Mo. Ct. App. 1916).

111. *Id.* at 359.

112. *Id.* at 361 (emphasis added).

Perhaps the most illustrative case of all, however, is *Pardee v. Royal Baking Co*.[113] There, the plaintiff was awarded $125 for his cocker spaniel who was negligently run over by the defendant's car.[114] The trial court and the appellate court refused to set aside the award as excessive.[115] The appellate court repeated the plaintiff's testimony before commenting on it:

> He was rather small, short[-]legged dog, and was white in color, with red spots on him; he had a smooth head on top, and very long ears, very large feet, and had long hair on his chest, and hair on his feet, and hair on his elbows. His hair was silky, very fine, and he had no odor that dogs usually have, and he had great, big, large, brown eyes, which looked like human eyes; a very intelligent dog. He was one of the prettiest dogs I ever saw.[116]

The Supreme Court of Utah, noting the bond between humans and their pets, then said, "An odorless dog with human eyes! Fortunate was the defendant that the case was not tried before a sympathetic jury, and that a stony-hearted judge fixed the amount of damages!"[117] Justice Frick concurred, noting his own relationship with his dog:

> I unhesitatingly and heartily concur in the encomium of the Chief Justice on man's faithful and loyal friend and companion, the dog. In view of my vivid recollection of the early days on a pioneer farm in Iowa where my only playmate and companion was old faithful Carolus, I could not do otherwise. Many a cold day his fur provided warmth, and his fleas kept me active.[118]

113. Pardee v. Royal Baking Co., 221 P. 849 (Utah 1923).

114. *Id.* at 847.

115. *Id.*

116. *Id.* at 849.

117. *Id.*

118. *Id.* (Frick, J., concurring).

These early cases are notable for the fact that owners testified about their pets' importance to them, and value had a wide meaning.[119] These early cases are also notable for the appellate courts' willingness to defer to the factfinder's determination of value, especially when the defendant was challenging the award as excessive.[120] As a late-nineteenth-century treatise writer explained, "The law allows juries great latitude in assessing damages in cases of torts, and courts seldom disturb their verdicts in such cases for any reason."[121] Appellate courts were less deferential when the factfinder came back saying the pet had no value.[122]

Admittedly, the reported cases do not explicitly mention recovery for the loss of the human-pet bond. No grand statements exist, like occasionally appear today, that a pet's "worth is not primarily financial, but emotional; its value derives from the animal's *relationship* with its human companions."[123] This silence regarding compensation for the loss of the human-pet bond should not be surprising. After all, the concept is of very recent origin. Veterinary medicine identified the bond's importance in the early 1970s–80s,[124] the public gained awareness of this idea in the 1980s,[125] and the legal profession started recognizing the concept thereafter.[126] Rather, recovery for loss of the human-pet bond was implicit in the jury's award following the owner's testimony. The absence of terminology identifying this component of damages does not negate the fact that

119. *See, e.g.*, McCallister v. Sappingfield, 144 P. 432, 434 (Or. 1914); Ellis v. Oliphant, 141 N.W. 415, 416 (Iowa 1913); Citizens' Rapid Transit Co. v. Dew, 45 S.W. 790, 792–93 (Tenn. 1898); Uhlein v. Cromack, 109 Mass. 273, 274 (1872).

120. *See, e.g.*, *McCallister*, 144 P. at 434; Heiligmann v. Rose, 16 S.W. 931, 932 (Tex. 1891); Swann v. Bowie, 23 F. Cas. 504, 505 (D.C. Cir. 1820); *cf.* Johnston v. Wilson, 123 S.E. 222, 223 (1924) (holding jury could consider the relative value of the animals in determining if the defense of property was reasonable under the circumstances); Anderson v. Smith, 7 Ill. App. 354, 359 (App. Ct. 1880) (same).

121. EGGLESTON, *supra* note 101, at 609.

122. *See, e.g.*, Henderson v. Louisville Ry. Co., 68 S.W. 645, 646 (Ky. Ct. App. 1902); Mendenhall v. Struck, 224 N.W. 95, 96, 98 (Iowa 1929).

123. Morgan v. Kroupa, 702 A.2d 630, 633 (Vt. 1997) (emphasis added).

124. Linda M. Hines, *Historical Perspectives on the Human-Animal Bond*, 47 AM. BEHAV. SCIENTIST 7, 7–8 (2003).

125. *Id.* at 12.

126. *Id.* at 10–11. The earliest case in which this terminology was used was *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996).

humans placed their affections on animals, including pets that hunted or worked,[127] and testified about their loss.

Despite the cases discussed above, plaintiffs were not always allowed to testify about the value of their pets. For example, in *Brown v. Hoburger*, the owner of a farm dog was not competent to give an opinion as to the dog's value because the dog was not shown to be marketable.[128] The court said, "Opinions as to value, founded upon the mere taste or fancy of the owner, or the witness, are not competent."[129] The plaintiff's lawyer suggested that the plaintiff would have addressed the "fidelity and vigilance of that faithful servant,"[130] but the court explained that such qualities were irrelevant to value, as presumably were other qualities such as companionship. It explained: "Under the question as put to the witness, he could have given, with impunity, the most extravagant value, as he could have had in his mind a thousand of the most fanciful and insubstantial elements of value."[131]

Judges who excluded the plaintiff's testimony, or who told the jury it was irrelevant,[132] had various doctrinal bases for doing so. Sometimes, as in *Brown*, it was because the pet had to have market value before the value to the owner was considered, and the pet had none.[133] At other times, the opposite was true: the pet had to have no market value before the court would allow the value-to-the-owner measure, and the pet had some market value.[134] Sometimes compensation was permitted only for the pet's pecuniary value,[135] and evidence about the plaintiff's bond with the pet was irrelevant.[136] In addition, the plaintiff might not qualify as an expert who could offer an

127. In fact, in *Pets in America*, some of the photographed family pets were also working or hunting dogs. *See, e.g.*, GRIER, *supra* note 67, at 26, fig. 1.4.

128. Brown v. Hoburger, 52 Barb. 15, 25 (N.Y. Gen. Term 1868).

129. *Id.* at 24.

130. *Id.*

131. *Id.*

132. *See, e.g.*, Smith v. Griswold, 15 Hun. 273, 274 (N.Y. 1878).

133. *See* Spray v. Ammerman, 66 Ill. 309, 310, 313 (1872).

134. *See* Young's Bus Lines v. Redmon, 43 S.W.2d 266, 267 (Tex. Civ. App. 1931); Wilkinson v. Boor Singh, 269 P. 705, 708 (Cal. Dist. Ct. App. 1928); Hodges v. Causey, 26 So. 945, 946 (Miss. 1900).

135. *See, e.g.*, Kearney v. Walker, 294 S.W. 407, 408 (Ark. 1927); Kanis v. Rogers, 177 S.W. 413, 415 (Ark. 1915).

136. *See* Dunlap v. Snyder, 17 Barb. 561, 565–66 (N.Y. Gen. Term 1854).

opinion on market value.[137] In *Crawford v. International & Great Northern Railroad Co.*,[138] for example, the appellate court approved the following jury instruction by the district court: "that the measure of damages was the market value of the horse at [the] time it was killed, and that the jury should not give any damages for the love and affection that appellant had for the horse."[139] Apparently the plaintiff did not testify as to his love and affection for the horse or even mention it in the pleadings; he thought, therefore, that the instruction "was calculated to mislead the jury."[140] Nonetheless, the appellate court affirmed the award, which was only half of what the plaintiff had initially recovered in the justice's court.[141]

Some courts also started narrowly applying the value-to-the-owner measure, excluding recovery for loss of the human-pet bond. For example, in the 1906 case *Klein v. St. Louis Transit Co.*, the plaintiff's Irish Setter, Sport, was run over by a streetcar.[142] Sport was an amazing dog. He was "trained in the art of hunting and other sports," and although "a family dog," was "brought to a standard of human intelligence" with "great care and skilled training."[143] Among other things, Sport "could play the piano, and, at the command of his master, would go and fetch things about the house and carry a basket to and from the market, and do many other intelligent things that the ordinary dog is incapable of being trained to do."[144] The appellate court said the proper measure of damages was the value to the owner, but that could not reflect the plaintiff's testimony "that he prized the dog very highly and took pleasure in its company and was proud of the smart things it would do."[145] Otherwise, the jury might impermissibly award damages for "his loss of the dog's company and the deprivation of the

137. *See* Smith v. Griswold, 15 Hun. 273, 274 (N.Y. 1878).

138. Crawford v. Int'l & G.N.R. Co., 27 S.W. 263 (Tex. Civ. App. 1894).

139. *Id.* at 264.

140. *Id.*

141. *Id.* The *Crawford* court may have been influenced by a Texas statute that allowed the plaintiff to recover "the value of all stock killed or injured." Hous. & Tex. C. R. R. Co. v. Muldrow, 54 Tex. 233, 234 (1881) (citing Tex. Rev. Civ. Stat. art. 4245).

142. Klein v. St. Louis Transit Co., 93 S.W. 281, 282 (Mo. Ct. App. 1906).

143. *Id.*

144. *Id.*

145. *Id.*

amusement and pleasure the dog afforded, as well as the dog's pecuniary value."[146]

Similarly, in the 1931 negligence case *Young's Bus Lines v. Redmon*, a blind man could recover for the loss of his seeing-eye dog, but not for all the pleasure that the dog brought to him.[147] The trial judge told the jury that it could consider the dog's usefulness to the plaintiff as well as his "special value . . . if any."[148] The jury awarded $1,500.[149] The defendant objected, claiming insufficient evidence supported the $1,500 award.[150] The Court of Civil Appeals of Texas agreed with the defendant: "It was not proper for appellee to be permitted to testify that he would not have taken $5,000 for his dog . . . . Any peculiar or sentimental value placed upon the dog by appellee, or what he considered the dog worth to him, was not admissible."[151] That same year, a New York court flatly stated: "While one's feelings for a dog constitute a sentiment which we are inclined to value, it is not recognized as an element of damage."[152]

In sum, although at early common law plaintiffs could testify in broad terms about the value of their animals when seeking damages, by the early twentieth century some courts disallowed such testimony for various reasons. In these latter cases, the jury was unlikely to hear about the plaintiff's affection for the pet. The one thing that unified these latter cases was a growing distrust of the jury.[153] There was a widespread belief that juries were out to "soak the rich,"[154] and that

146. *Id.* at 283.

147. Young's Bus Lines v. Redmon, 43 S.W.2d 266, 267 (Tex. Civ. App. 1931).

148. *Id.* at 267.

149. *Id.*

150. *Id.*

151. *Id.* at 268.

152. Smith v. Palace Transp. Co., 253 N.Y.S. 87, 88 (Mun. Ct. 1931).

153. WILLIS, *supra* note 103, at § 23 (noting the question of damages transitioned from an issue for the jury to an issue for the judge); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 160 (1935) (discussing how the legal concept of value is "of a late phase in the process of subjecting the jury's power to control by the judge," in contrast to earlier times when the jury could determine damages "almost uncontrolled").

154. Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 209 (1998).

noneconomic loss was subject to exaggeration and fraud.[155] The distrust of the jury prompted the new rules limiting owners' testimony as well as new rules of evidence more generally.[156] The purpose was the same: to keep the juries' awards reasonable. The court in *Dunlap v. Snyder*, for example, described its decision to disallow the owner's testimony regarding value as the "safer rule."[157]

Commentators at the time had a mixed response to the state of the law. Some treatise writers disregarded altogether the question of whether loss of the human-pet bond was compensable,[158] or gave it minimal attention.[159] Others, however, disagreed with those courts that rejected evidence regarding sentimentality. For example, Professor Charles McCormick, in his *Handbook on the Law of Damages*, noted that,

> Recent cases have denied that sentimental value can be taken in account in valuing wearing apparel and ordinary household goods, and this seems proper enough, but, when some of the courts deny recovery for loss of the companionship of a favorite dog . . . one feels some doubt whether the standard of the market place is not misapplied.[160]

The growing hostility to using the value-to-the-owner measure to capture an owner's affection for the pet had its most significant effect in states that also disallowed parasitic mental distress damages. States at the time were divided on this point, although it was much more likely

155. *See, e.g.*, Linn v. Duquesne Borough, 204 Pa. 551, 554–56 (1903); *cf.* Gregory v. Chohan, 670 S.W.3d 546, 553 (Tex. 2023) ("The chief justifications for the common law's skepticism of mental anguish damages were '[t]he inherently subjective nature of mental anguish,' 'the concomitant potential for false claims,' and the resistance of non-pecuniary, emotional injuries to rational monetization.") (citation omitted).

156. Friedman, *supra* note 154, at 205.

157. Dunlap v. Snyder, 17 Barb. 561, 565–66 (N.Y. Gen. Term 1854).

158. *See, e.g.*, EGGLESTON, *supra* note 101, at 205–06; J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 469–537 (1888).

159. *See, e.g.*, JOHN H. INGHAM, A TREATISE ON PROPERTY IN ANIMALS: WILD AND DOMESTIC 163–66 (1900) ("Nor can damages be given for love and affection.").

160. MCCORMICK, *supra* note 153, at 169–70 (citing Klein v. St. Louis Transit Co., 93 S.W. 281, 282 (1906)).

that courts would allow parasitic damages when property was intentionally, rather than negligently, injured.

2. Parasitic Mental Distress Damages

Some plaintiffs sought recovery for the loss of the human-pet bond by seeking mental distress damages directly. Where such recovery was allowed, it typically was the result of one or more of the following factors: (1) the claim was understood as one appropriate for the old writ of trespass, which permitted pain and suffering damages; (2) the mental distress was characterized as a natural consequence of the tort, allowing recovery even if the action sounded in trover or case; *or* (3) the defendant was subject to punitive damages, when punitive damages were meant to compensate the plaintiff for mental injury.

i. The Influence of Writs

At the turn of the twentieth century, the forms of action still affected a plaintiff's recovery, even though by 1925 "nearly all" states had statutes that abolished common law pleading.[161] Nonetheless, as William Prosser noted, "The hand of history lies heavy upon the tort of conversion."[162]

This narrative will not belabor legal history or get mired in minutia, but a few points about the writs' influence are important. Traditionally, the writ of trespass was used to address injury to and destruction of animals.[163] Over time, this writ spawned other writs, including trover and detinue,[164] to differentiate between things like how

161. FRANCES H. BOHLEN, TORTS TREATISE NO. 1(A) SUPPORTING RESTATEMENT NO. 1, at 15 (AM. L. INST. 1925).

162. William L. Prosser, *Nature of Conversion*, 42 CORNELL L. REV. 168, 169 (1957).

163. *See, e.g.*, Dand v. Sexton, 100 Eng. Rep. 442, 442 (1789) (permitting an action for trespass *vi et armis* for the beating the plaintiff's dog); George F. Deiser, *The Development of Principle in Trespass*, 27 YALE L. J. 220, 221 (1917) ("[T]he trespass in the early law was very frequently the taking of property."); *see generally* George E. Woodbine, *The Origins of the Action of Trespass*, 33 YALE L. J. 799, 801, 806–07, 809 (1924) (describing the writ as a creation of the King's Courts starting in the thirteenth century).

164. *See* F. W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW, at Lecture V (A. H. Chatytor & W. J. Whittaker eds. 1910).

the defendant came into possession of the property.[165] The modern tort of conversion is comprised of an amalgam of old writs, including trover and trespass.[166]

Under the writ system, damages varied with the particular writ.[167] Damages for emotional harm were typically available for trespass but not trover.[168] The reason for the difference may have been loosely attributable to the moral culpability typically associated with behavior triggering each writ. Trover was the correct writ when the plaintiff's property came into the defendant's possession innocently, such as when the defendant found lost property, or even rightfully, such as when the defendant was a bailor.[169] Trespass, in contrast, always involved the wrongful taking of property.[170] As such, exemplary damages were not usually awarded for trover,[171] and exemplary damages were used to compensate for emotional harm, as discussed below.[172]

Consequently, when the facts evoked the old writ of trespass, courts would routinely say that emotional distress damages were parasitic and available. For example, in the much-cited 1909 non-pet case of *Mattingly v. Houston*,[173] mental distress damages were appropriate when the defendant took furnishings from the plaintiff's home by "forcibly" entering the home.[174] The court explained the difference in damages for trover and trespass: "[T]here could be no

165. *See generally* John Salmond, *Observations on Trover and Conversion*, 21 L.Q. REV. 43, 47 (1905).

166. *See generally id.*

167. FIELD, *supra* note 101, at § 805.

168. *Id.* at § 14. *See, e.g.*, Harris v. Del., Lackawanna & W.R.R. Co., 82 A. 881, 882–83 (N.J. 1912).

169. Prosser, *supra* note 162, at 169. For a history of these claims, see JOHN SALMOND, THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 284–293 (6th ed. 1907); Salmond, *supra* note 165; J. B. Ames, *The History of Trover*, 11 HARV. L. REV. 277, 279 (1897); J. B. Ames, *The History of Trover II*, 11 HARV. L. REV. 374, 376 (1898); ALFRED PAUL NEWTON, COMPARISONS OF THE ACTIONS OF TRESPASS AND TROVER (1896) (B.A. thesis, Cornell University).

170. *See, e.g.*, EGGLESTON, *supra* note 101, at 238–39. *See also* FIELD, *supra* note 101, at § 791.

171. FIELD, *supra* note 101, at §§ 817, 821.

172. *See infra* notes 245–57 and accompanying text.

173. Mattingly v. Houston, 52 So. 78, 78 (Ala. 1909).

174. *Id.*

recovery on account of plaintiff's annoyance, suffering or mental anguish" for claims grounded in trover;[175] rather "[t]he measure of recovery" for trover "was the value of the property at the time of the conversion or at any time subsequent thereto, with interest."[176] The court continued, "But in trespass damages take a wider range," and included "compensation for the proximately resulting pecuniary loss,"[177] as well as for the mental harm that was "the proximate and natural consequence of the trespass committed with circumstances of insult or contumely . . . ."[178]

Animal cases reflected this idea. In *Wilson v. Kuykendall*, for example, the Supreme Court of Mississippi upheld an award of $100 for trespass for the wrongful removal of a mule from plaintiffs' barn, although the value of the mule was approximately $35.[179] The court held that damages could encompass compensation for the fright and disturbance caused to one of the plaintiffs and the humiliation and trouble caused to the other.[180] As in *Mattingly*, trespass to land coupled with trespass for "asportation of chattels" made pain and suffering damages especially appropriate.[181]

But even without trespass to land, emotional distress damages could be awarded for acts constituting trespass to chattels or conversion. In the 1880 case of *Kimball v. Holmes*,[182] for example, the plaintiff could recover for emotional distress when the defendant beat and injured the plaintiff's mare with an ax.[183] The Supreme Court of New Hampshire said that the plaintiff was entitled to "full compensation for all the injury sustained, mental as well as material."[184] It acknowledged that in some cases of trespass to chattels, "the material damages may be trivial, and the principal injury [may] be

175. *Id.* at 80.

176. *Id.*

177. *Id.*

178. *Id.* at 81.

179. Wilson v. Kuykendall, 73 So. 344, 344 (Miss. 1917).

180. *Id.*

181. George E. Woodbine, *The Origins of the Action of Trespass*, 34 YALE L. J. 343, 345 (1925). At common law, trespass to land traditionally allowed mental distress damages. *See* Meagher v. Driscoll, 99 Mass. 281, 285 (1868).

182. Kimball v. Holmes, 60 N.H. 163 (1880).

183. *Id.*

184. *Id.* at 164.

to the wounded feelings from the insult, degradation, and other aggravating circumstances attending the act."[185] The court emphasized that this was not punitive damages, but rather compensatory damages.[186] That designation aligned with Professor Greenleaf's observation at the time that a plaintiff is not "confined to the proof of actual pecuniary loss; for it has been always held that the jury might take into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, his quiet and sense of security in the enjoyment of his rights; in short his happiness."[187]

If the defendant had no intent to affect the property,[188] but was only negligent in causing harm, then trespass on the case ("case") was the proper writ.[189] That writ also permitted damages for mental anguish, but normally required that the plaintiff suffer a physical injury.[190] Negligently inflicted harm to property was usually insufficient to permit mental anguish damages because mental anguish was considered unforeseeable, i.e., not a natural and probable consequence of the defendant's action.[191] The outcome of an action brought in case might be otherwise if it involved some type of indignity and insult.[192] But, generally, courts disallowed mental distress

185. *Id.*

186. *Id.*

187. *See* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES app. at 609 (2d ed. 1852) (reproducing Professor Greenleaf's essay).

188. Prosser, *supra* note 162, at 174 n.25, 175 n.28.

189. MAITLAND, *supra* note 164, at Lecture VI ("special case" developed in the 1300s for indirect "application of unlawful physical force to the body, lands, or goods of the plaintiff"); Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 451–52 (1990).

190. RESTATEMENT OF THE LAW: 1948 SUPP. § 217 (AM. L. INST. 1949).

191. *See, e.g.*, Williams v. Underhill, 63 A.D. 223, 226 (N.Y. App. Div. 1901) (discussing reasonable anticipation). It was also sometimes considered unquantifiable. *See, e.g.*, Shelton v. Bornt, 93 P. 341, 342 (Kan. 1908) (Porter, J., dissenting); *see also* Bixby v. Dunlap, 56 N.H. 456, 462 (1876) (negligent harm to an ornamental fence).

192. *See, e.g.*, Merrills v. Tariff Manuf. Co., 10 Conn. 384, 388 (1835) ("We cannot perceive any good reason why one measure of damages should be meted out to a plaintiff, who sues in trespass, and a different one, to a plaintiff who sues in case, for a similar injury, attended with similar circumstances. Such distinction would be as arbitrary and unjust, as it is technical."); *see also* EGGLESTON, *supra* note 101, at 34–35. *See infra* notes 226–27 and accompanying text.

damages for negligent injury to a pet,[193] although some courts held otherwise when it could be characterized as the natural and probable consequence of the defendant's action, as the next section will discuss.

The difference in the availability of emotional distress damages for claims evoking, or brought under, the writs of trespass, trover, or case was more formalistic than principled. Field pointed out that the facts might be the same regardless of the writ, and there was "no reasonable grounds for any difference."[194] Sometimes a defendant might even be less morally culpable when the claim sounded in trespass than trover or case. The writ of trespass, which was often used for trespass to chattels or conversion,[195] only required that the defendant intend to use the plaintiff's property in a way that was inconsistent with the plaintiff's rights.[196] As Frederick Pollack's treatise explained, the defendant might even act under a reasonable mistake because "the law expects me at my peril to know what is my neighbour's in every case."[197] The law only required an intention to do the act that constituted the trespass or conversion.[198] In fact, in the nineteenth century, "Trespass to personal property was a strict liability tort."[199] Consequently, some trespass actions were grounded in the defendant's negligence or innocent mistake, not malice or more serious wrongdoing.[200]

193. *See, e.g.*, Buchanan v. Stout, 108 N.Y.S. 38, 38 (App. Div. 1908) (denying recovery for distress caused when plaintiff witnessed a dog maul a pet cat).

194. FIELD, *supra* note 101, at § 806.

195. George Luther Clark, *The Test of Conversion*, 21 HARV. L. REV. 408, 413 (1908); *see* Vandevelde, *supra* note 189, at 448.

196. *See, e.g.*, SIMON GREENLEAF, 2 A TREATISE ON THE LAW OF EVIDENCE §§ 270, 622 (3d ed. 1846).

197. FREDERICK POLLOCK, A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 10 (4th ed. 1895).

198. *Id.*

199. Vandevelde, *supra* note 189, at 453; *see* FIELD, *supra* note 101, at § 780; Hobart v. Hagget, 12 Me. 67, 71 (1835).

200. *See, e.g.*, Dexter v. Cole, 6 Wis. 319, 321 (1858) (upholding liability for *trespass de bonis asportatis* when defendant mistakenly slaughtered sheep that became mixed up with his flock); Higginson v. York, 5 Mass. 341, 342 (1809) (upholding liability for *trespass quare clausum oregit* when defendant entered plaintiff's land and took his wood, mistakenly believing he was authorized to do so).

Treatise writers at the time called on courts to minimize the writs' influence and to unify damages for property torts.[201] While their focus was usually on distinctions not relevant here (e.g., whether damages should be computed from the time of the conversion or, if the property increased in value, from a later time,[202] or whether recovery should be available for the expense of searching for the converted item[203]), their same general point applies. The facts, not the writ, should matter to damages,[204] and the most important fact for determining the availability of damages for mental harm should be moral blame, e.g., whether the conversion was done innocently or willfully.[205]

Deference to the old writs was, in fact, a poor proxy for two other issues that courts rightfully considered important: whether the damage was a natural and probable consequence of the tort and the defendant's level of blameworthiness. Courts sometimes emphasized these factors and allowed emotional distress damages even in cases in which the historic writs would not have permitted it.

ii. The Natural and Probable Consequences of the Tort

Courts at early common law generally permitted mental anguish damages when they could characterize the distress as a natural consequence of the tort.[206] William Benjamin Hale's *Handbook on the Law of Damages* described the general rule: damages for mental suffering were allowed for "a wrongful act causing material damage," so long as the "suffering follows as a natural and proximate result."[207] This formula could permit recovery for mental harm that arose from injury to the plaintiff's property,[208] although such compensation "is not usually an element of damage in actions of tort for injuries to

201. FIELD, *supra* note 101, at § 807.

202. *See, e.g.*, EGGLESTON, *supra* note 101, at 242–45.

203. FIELD, *supra* note 101, at § 796.

204. *Id.* § 807.

205. EGGLESTON, *supra* note 101, at 248, 313.

206. *See supra* notes 173–78 and accompanying text (discussing *Mattingly v. Houston*).

207. WILLIAM B. HALE, HANDBOOK ON THE LAW OF DAMAGES 149 (2d ed. 1912).

208. *See id.* at 155; *see also* WILLIS, *supra* note 103, at § 22.

property."[209] The reasoning was tautological: "Mental suffering is not usually a natural or proximate consequence of that class of torts."[210] But Hale noted that cases went both ways, including for the malicious abuse of a plaintiff's horse.[211]

Osborne v. Van Dyke, decided by the Iowa Supreme Court, was a prominent case that laid the foundation for potential recovery of damages for mental injury in the case of injured pets, although the issue was whether a *physical* injury was the natural and probable consequence of the defendant's acts.[212] *Osborne*'s facts are evocative of *Brown v. Kendall*, the famous case known for its requirement that a plaintiff must prove fault even when an unintentional injury is forcible and direct and fell within the old writ of trespass.[213] In *Osborne*, the defendant's job was to care for the plaintiff's horses.[214] When a horse moved abruptly and knocked medicine from the defendant's hand, the defendant became angered and used a twitch with a nail in the end to "violently and brutally beat[] the horse, which struggled to escape."[215] The plaintiff was present and tried, unsuccessfully, to stop the defendant.[216] As the defendant continued the beating, he slipped and struck the plaintiff in the face with the twitch, causing the plaintiff serious injury.[217] The plaintiff sued for his injury, but the jury decided the defendant was not negligent.[218]

The appellate court reversed and remanded, indicating that the issue of negligence should have been decided as a matter of law.[219] The defendant's act was wrongful, as it violated a statute that prohibited

209. HALE, *supra* note 207, at 159.

210. *Id.*

211. *Id.* at 159–60 (citing Kimball v. Holmes, 60 N.H. 163, 164 (1880)).

212. Osborne v. Van Dyke, 85 N.W. 784, 785 (Iowa 1901).

213. Brown v. Kendall, 60 Mass. 292, 292 (1850). In this case, the plaintiff beat two fighting dogs with a stick to separate them. One belonged to the plaintiff and the other to the defendant. During the incident, the defendant was struck in the eye with the stick. *Id.*

214. *Osborne*, 85 N.W. at 785.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

cruelty to animals.[220] Therefore, the doctrine of negligence per se applied.[221] In addition, and relevant here, the appellate court held that the jury should have been instructed that if the defendant was negligent, then "he is liable for the natural and probable consequences of his act, even though the precise result which followed may not have been anticipated."[222] That meant proximate cause would not foreclose the plaintiff's recovery for physical injury as a matter of law.[223] Presumably, the same logic could extend to the man's emotional injury if he was not physically injured but instead was traumatized from the violent acts toward his horse, perhaps with a resulting physical effect.

This "natural and probable" formula appeared in a wide variety of cases in which emotional distress damages were permissible. It was evident in intentional tort cases,[224] but also when nonphysical injury was "caused by negligence and carelessness only, and not by design."[225] It permitted recovery for emotional harm when there were aggravating circumstances,[226] including gross negligence.[227] In fact, Francis Bohlen, an acclaimed torts scholar and the Reporter for the *Restatement of Torts*, thought mental distress damages were available for negligent injury to property so long as the circumstances were "peculiar" and the sufferings "were natural." His views appeared in footnote 23 of his article, *Right to Recover for Injury Resulting from Negligence Without Impact*.[228] Although Bohlen cited cases that were

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *See, e.g.*, Allen v. Camp, 70 So. 290, 290–91 (Ala. Ct. App. 1915).

225. *See* Stowe v. Heywood, 89 Mass 118, 122–23 (1863) (noting "authorities are not uniform" on the answer to the question "whether damages for such suffering can be recovered, when it is the effect of an injury caused by negligence or carelessness only, and not by design"). *See, e.g.*, Meagher v. Driscoll, 99 Mass 281, 283, 285 (1868) (allowing recovery "if it appears that the defendant acted in willful disregard or careless ignorance of the plaintiff's rights") (disinterring plaintiff's child from cemetery).

226. *See* Shipley, *supra* note 32, at § 2; NEWTON, *supra* note 169, at 38–39.

227. *Meagher*, 99 Mass. at 283–84; Winchester v. Craig, 33 Mich. 205, 217 (1876) (mentioning "willful negligence"); *see supra note* 192 and accompanying text.

228. Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 41 AM. L. REG. 141, 144–45 n.23 (1902). Bohlen's casebook,

somewhat more limited than the view he expressed,[229] these cases cited others with broad dicta supportive of recovery.[230]

Assessing whether emotional distress damages are a natural and probable consequence of a tort is a more flexible basis for permitting these damages than analogizing to an appropriate writ. And, in fact, courts allowed damages for mental anguish even when the action was brought in trover, especially if the item had sentimental value or there was willful wrongdoing.[231] Although few cases exist in which negligence to personal property justified damages for mental harm, some do exist. For example, in *Rasmussen v. Benson*, the Nebraska Supreme Court let stand an award for emotional distress damages after "great mental and nervous shock caused by the poisoning of his live stock, the subsequent loss of his dairy business, and the fear of communicating the poison to his dairy customers."[232] The case continued as a survival action because during the proceedings the livestock owner "died of a decompensated heart caused by an excessive emotional disturbance."[233] The dissent argued there was a clear absence of proximate cause, and this award was for "negligence in the air."[234]

however, reveals no position on the issue. *See* FRANCIS H. BOHLEN, CASES ON THE LAW OF TORTS (4th ed. 1915).

229. *Fillebrown v. Hoar* was really an intentional tort case involving willfulness, although it mentioned that "gross carelessness" would permit damages for emotional distress. 124 Mass. 580, 585 (1878). In *White v. Dresser*, the court rejected recovery for mental injury, saying gross carelessness was insufficient. 135 Mass. 150, 152 (1883).

230. *White v. Dresser,* 135 Mass. at 152, cited cases that allowed recovery, including *Stowe v. Heywood*, 89 Mass. at 123 (harbored and secreted the father's minor daughter), and *Meagher v. Driscoll*, 99 Mass. at 284 (disinterring plaintiff's child from cemetery).

231. *See, e.g.*, Hill v. Canfield, 56 Pa. 454, 459 (1867) (conversion of timber); Winchester v. Craig, 33 Mich. 205, 217 (1876) (citing Forsyth v. Wells, 41 Pa. 291, 296 (1861)).

232. Rasmussen v. Benson, 280 N.W. 890, 890 (Neb. 1938) (Carter, J., dissenting).

233. *Id.*

234. *Id.* at 898.

A focus on the natural and probable consequences of the tortious act was not a panacea for plaintiffs, however.[235] Proximate cause is a doctrine that limits liability, and the argument about the natural consequences of an act can cut both ways. In fact, the concept could undercut the availability of parasitic damages for emotional harm even when the old writ of trespass would have permitted recovery. For example, in *Allen v. Camp*, the defendant was not liable for emotional harm when the plaintiff's pregnant wife "became excited and hysterical" upon learning, hours after the event, that her dog had been shot by the defendant.[236] The defendant had entered the plaintiff's home to shoot the dog, who was tied up, in order to retrieve the dog for rabies tests because the dog had bitten the defendant's child.[237] The appellate court reversed the jury verdict for the plaintiff and remanded the case, declaring: "This injury not being one which the defendant could reasonably be expected to anticipate as likely to ensue from his conduct, it cannot be regarded as a natural consequence for which the defendant would be legally responsible."[238]

As *Allen* suggests, judges sometimes determined for themselves what was a natural and probable consequence instead of respecting the jury's view. The judicial determination of legal causation even extended at times to the physical consequences of the emotional distress. For example, the Minnesota Supreme Court acknowledged in *Renner v. Canfield* that emotional distress was a natural and probable consequence of shooting a dog, but it refused to believe the same for the plaintiff's resulting physical harm.[239] Consequently, it set aside the jury's award of damages.[240] There the plaintiff, a pregnant woman, witnessed the shooting of a relative's dog and afterwards suffered serious health consequences.[241] The court was bewildered whether she was alleging damages based on the killing of the dog or the negligent

235. The plaintiff might need to plead the damages specifically as special damages. *Compare* ADDISON, *supra* note 98, at § 542 (1906), *with* JOSEPH A. JOYCE & HOWARD C. JOYCE, A TREATISE ON DAMAGES § 80, at 68–69 (1903).

236. Allen v. Camp, 70 So. 290, 291 (Ala. Ct. App. 1915).

237. *Id.*

238. *Id.*

239. Renner v. Canfield, 30 N.W. 435, 436 (Minn. 1886).

240. *Id.*

241. *Id.*

firing of a gun so near to the house.[242] It was only the latter that could sustain the award for her mental injury, in part because the dog belonged to her father-in-law, the defendant was unaware of the plaintiff's presence, and her physical harm from the gunshot was likely attributable to fright, not pain and suffering for loss of the dog.[243] The court remanded the case for trial solely on the negligence theory.[244]

iii. The Relevance of Smart Money

Following injury to their pets, plaintiffs sometimes recovered damages for their emotional harm through "smart money," i.e., damages triggered by malicious or seriously wrongful behavior.[245] These damages were called vindicative, exemplary, or punitory awards and were available even when the defendant injured only property.[246] Jurists and scholars disputed the purpose of such damages, but some thought their purpose was to compensate for mental suffering. As one court stated, "We glean from the decisions and treatises that the rule is to compensate for mental suffering due to torts against property when the acts complained of were wrongful and malicious . . . ."[247]

In 1876, Chief Justice Cushing of the Superior Court of Judicature of New Hampshire emphasized the compensatory purpose of such damages. Despite the labels for these awards,[248] Cushing argued that more liberal damage rules for mental anguish existed when

242. *Id.* at 435.

243. *Id.* at 436.

244. *Accord* Alabama Fuel & Iron Co. v. Baladoni, 73 So. 205, 207 (Ala. Ct. App. 1916) (recognizing defendant could be liable for a miscarriage resulting from fright when defendant shot a dog in front of a visibly pregnant woman and near her child). *See generally* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 815 (1990) (discussing how the gender of the plaintiffs influenced the doctrinal structure).

245. *See, e.g.*, Wort v. Jenkins, 14 Johns 352, 352 (N.Y. Sup. Ct. 1817); Parker v. Mise, 27 Ala. 480, 482 (1855); Board v. Head, 33 Ky. 489, 492–93 (Ct. App. 1835).

246. *See, e.g.*, Carter v. Oster, 112 S.W. 995, 999 (Mo. Ct. App. 1908); *see* EGGLESTON, *supra* note 101, at 12.

247. *Id. See* EGGLESTON, *supra* note 101, at 12.

248. Bixby v. Dunlap, 56 N.H. 456, 465 (1876) (tort of interfering with a contract between master and servant).

the defendant's actions warranted them.[249] Cushing advocated for the use of the following jury instruction:

> [I]nstead of awarding damages only for those matters which are capable of exact pecuniary valuation, [jurors] may take into consideration all the circumstances of aggravation,—the insults, offended feelings, degradation, and so on,—and endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay.[250]

Ten Hopen v. Walker illustrates that smart money compensated the plaintiff for emotional harm when the defendant maliciously injured the plaintiff's pet.[251] There the defendant shot the plaintiff's dog when the dog entered the defendant's property to drink from the pond.[252] The trial judge instructed the jury that "the plaintiff was entitled to recover actual damages, which would consist of the value of the dog at the time it was killed," and exemplary damages if there had been malice.[253] The Supreme Court of Michigan found no error in the charge and affirmed a $225 jury verdict for the malicious killing of the plaintiff's dog. Its decision emphasized that exemplary damages were compensatory:

> Usually, where an act is done with design, and from willful and malicious motives, the law compels full compensation, and full compensation may not be awarded by the payment of the actual value. Damages in excess of the real injury are never appropriate where the injury has proceeded from misfortune, rather than from any blamable act; but, where the act or trespass complained of arises from willful and malicious conduct, exemplary damages are recoverable. These damages are

249. *Id.* at 465.

250. *Id.* at 464.

251. Ten Hopen v. Walker, 55 N.W. 657, 657–58 (Mich. 1893).

252. *Id.* at 657.

253. *Id.*

> not awarded as a punishment to the wrongdoer, but to compensate the injured party.[254]

While an award of exemplary damages usually required that the defendant behaved worse than negligently, courts held that gross negligence could also qualify. The same year *Ten Hopen* was decided, George W. Field, author of *A Treatise on the Law of Damages*, wrote:

> The line between compensatory and exemplary damages is frequently indistinct, and in many cases practically unimportant. Compensation may, *in aggravated cases of gross negligence* or fraud, or where the wrong is inflicted maliciously or wantonly, or with circumstances of contumely and indignity, or under any circumstances of aggravation, be extended to cover all losses and injuries thereby received, including injury to the feelings, to paternal affections and rights, loss of time, bodily suffering, mental agony, lacerated feelings, disappointed hopes, loss of services, and expenses of nursing and curing. These are elements which it is conceded, in most cases, are proper to be considered by the jury, in estimating damages in such cases, under the rule of compensation.[255]

The law relating to pets reflected Field's view, at least in some places. For example, the New York Supreme Court, Appellate Division, implied in dicta that gross negligence would entitle a plaintiff to recover mental distress damages for injury to a pet.[256] California enacted a statute in 1872 that said, "For wrongful injuries to animals being subjects of property, committed willfully or by *gross negligence*, in disregard of humanity, exemplary damages may be given."[257]

Compensating mental suffering through smart money became more complicated as the purpose of exemplary awards changed.

254. *Id.*

255. FIELD, *supra* note 101, at 70 (emphasis added); *see, e.g.*, Henderson v. Weidman, 130 N.W. 579, 580 (Neb. 1911); *see also* EGGLESTON, *supra* note 101, at 4–5.

256. Buchanan v. Stout, 108 N.Y.S. 38, 39 (App. Div. 1908).

257. CAL. CIV. CODE § 3340 (2024) (emphasis added).

Scholars such as Theodore Sedgwick, a vocal proponent of punitive damages, argued that exemplary damages should only punish, not compensate, and should therefore exclude an award of emotional distress damages.[258] He thought punitive damages were not needed to compensate intangible injuries because American courts, unlike English courts, already did so.[259] Professor Greenleaf, a vocal opponent of punitive damages, thought punitive damages were always inappropriate because private litigation should only compensate, not punish.[260] He also assumed that plaintiffs were already compensated for mental injury,[261] albeit when circumstances showed an evil intent.[262]

Ultimately, Sedgwick's view prevailed:[263] punitive damages were permissible, but were not for compensation.[264] As a result, plaintiffs lost an important avenue for compensation of mental anguish. Some courts probably responded to the changes in punitive damages by shifting recovery for mental anguish to the compensatory side of the

258. *See* Hendrickson v. Kingsbury, 21 Iowa 379, 390 (1866) (citing THEODORE SEDGWICK, ON THE MEASURE OF DAMAGES (2d and 3d eds. 1852, 1858)); *see also* DeMendoza v. Huffman, 51 P.3d 1232, 1241 (Or. 2002) (citing SEDGWICK ON DAMAGES (4th ed.), at 532).

259. *DeMendoza*, 51 P.3d at 1239–40.

260. *See* SEDGWICK, *supra* note 187, at 610 (reproducing Greenleaf's essay arguing that punitive damages improperly combine the aggrieved individual's interest in compensation with society's interest in punishing a defendant); *cf.* SIMON GREENLEAF, 2 A TREATISE ON THE LAW OF EVIDENCE §§ 266, 270, 272 (3d. ed. 1846).

261. SEDGWICK, *supra* note 187, at 609 (reproducing Greenleaf's essay noting that a jury is permitted to consider "every circumstance of the act which injuriously affected the plaintiff," including the plaintiff's happiness and peace of mind).

262. *Id.* at 625 (reproducing Greenleaf's essay indicating that while intent may affect damages, the essence of civil cases is the injury caused to the plaintiff—not whether the defendant acted with malice or ignorance).

263. *See, e.g.*, EGGLESTON, *supra* note 101, at 41; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 113 (1992); Hendrickson v. Kingsbury, 21 Iowa 379, 390 (1866).

264. In 1851, the U.S. Supreme Court said punitive damages should be determined "having in view the enormity of his offence rather than the measure of compensation to the plaintiff." Day v. Woodworth, 54 U.S. 363, 371 (1851). By 1934, when the *Restatement of Torts* was published, most courts thought punitive damages were for punishing and deterring, not compensating. *DeMendoza*, 51 P.3d at 1242.

ledger,[265] instructing juries to give "fair compensation"[266] and recognizing that the Sedgwick-Greenleaf debate was never about the permissibility of mental distress damages.[267] For those courts, a plaintiff could recover for the mental suffering caused by a property tort so long as the defendant's action was sufficiently wrongful, like when it was prompted by a wrongful motive such as malice.[268] But both Greenleaf's and Sedgwick's characterization of American law was arguably too generous; courts did not always allow compensation for plaintiffs' intangible injuries, at least when a pet was involved, even when aggravating circumstances existed. That is why *Scheele* eventually came out the way it did[269]—recall maliciousness alone did not support recovery of damages for the owners' mental distress following Shadow's injury and death, although punitive damages may have been recoverable.

At common law, the three doctrinal hooks for permitting parasitic damages—the legacy of the writ, the natural and probable consequence of the act, and smart money—obviously overlapped. When the defendant's action was morally blameworthy, it was most likely to evoke the old writ of trespass, to be the natural and probable cause of the plaintiff's emotional harm, and to be appropriate for smart money that compensated for emotional damage. Consequently, judges at early common law were most likely to permit mental suffering damages for an intentional tort to property when aggravating circumstances existed.

As described next, the *First Restatement*'s provisions tried to reflect the trends that were developing at common law. Unfortunately, imprecise drafting hampered plaintiffs' recovery for loss of the human-pet bond in the intentional tort context when emotional harm should have been recoverable as parasitic damages in appropriate cases. This imprecision occurred within the sections on liability and remedies as

265. *See* Shepard v. Chi. R.I. & P. Ry. Co., 41 N.W. 564, 565 (Iowa 1889); WILLIS, *supra* note 103, at § 22; BRISCOE BALDWIN CLARK, NEW YORK LAW OF DAMAGES § 151, at 262–64 (1925).

266. *See* John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1257 (2008).

267. Hendrickson v. Kingsbury, 21 Iowa 379, 390 (1866) (assault and battery).

268. *See* Murray v. Mace, 59 N.W. 387, 389 (Neb. 1894) (citing cases from other states).

269. *See supra* notes 51–65 and accompanying text.

well as when the sections were read together. To the extent that one read the *First Restatement* restrictively, i.e., as disallowing recovery for emotional harm following an intentional tort to a pet, the *First Restatement* provided no explanation for why this was good policy or how it could be reconciled with contrary authority.

B. The Restatement of Torts

The first of four volumes of the original *Restatement of Torts* (the "*First Restatement*") emerged in 1934. With over 900 sections at completion, the *First Restatement* was a triumph of determination as well as a legal masterpiece. Animals, including pets, were clearly classified as property. The *First Restatement*'s substantive provisions on trespass to chattels gave numerous examples of harm to animals. For instance, "beat[ing] another's horse or dog" was a trespass as was "deliberately driv[ing] or frighten[ing] a [herd of sheep] down a declivity."[270] Arthur Goodhart, an early commentator on the *First Restatement*, predicted the chapters on intentional property torts and damages would receive significant attention.[271]

The *First Restatement* embodied an organizational structure that was heavily influenced by the old forms of action,[272] and that influence persists today.[273] The *First Restatement* grouped together claims for intentional harms to persons, land, and chattels, and separated them from negligence claims.[274] Parasitic damages were available for intentional torts, although some drafting inconsistencies made the *Restatement*'s position more ambiguous than it should have been in the property tort context.

270. RESTATEMENT OF TORTS § 217 cmt. b (AM. L. INST. 1934).

271. Arthur L. Goodhart, *Restatement of the Law of Torts, II*, 83 U. PENN. L. REV. 968, 974 (1935) (noting "no subject is so controversial or uncertain as that of possession"); Arthur L. Goodhart, *Restatement of the Law of Torts, Volume IV: A Comparison Between American and English Law*, 91 U. PENN. L. REV. 487, 512 (1943) (predicting the damage sections would be of "great interest" because American law on damages was so uncertain).

272. Goodhart, *Restatement of the Law of Torts, II*, *supra* note 271, at 974; Kenneth S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293, 341 (2021).

273. Abraham & White, *supra* note 272, at 332.

274. *Id.* at 320.

1. Parasitic Mental Distress Damages for Intentional Torts to Property

The *First Restatement* explained that emotional tranquility on its own was not an interest protected by law,[275] except in the narrow instance when the harm was caused by servants of common carriers who insulted passengers.[276] Section 46 stated the background rule: there is no interest in freedom from emotional distress, absent otherwise tortious conduct.[277] It did not matter if the defendant intended to inflict such emotional distress, so long as that was the only outcome.[278]

The answer was otherwise, however, once the defendant, acting with the requisite intent,[279] caused bodily harm or invaded "any legally protected interest."[280] Property is a "legally protected interest."[281] Section 47 reflected this rule. Its illustrations suggested the availability of damages for emotional harm in a wide variety of contexts involving culpable conduct that invaded interests other than the plaintiff's bodily security.[282] Calvert Magruder thought that section 47(b), which permitted emotional distress damages for any intended or likely invasion of legally protected interests, was "the established rule

275. RESTATEMENT OF TORTS § 1 cmt. a (1934) (discussing "interest").

276. *See id.* § 46.

277. *Id.*

278. *Id.* §§ 46, 47(a) cmt. a.

279. *See, e.g.*, *id.* § 16.

280. *Id*. § 47(b) ("[I]f the actor has by his tortious conduct become liable for an invasion of any legally protected interest of another, emotional distress caused by the invasion or by the tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other.").

281. *Cf. id.* § 47 (describing how the law of property determines when legally protected interests exist for property). *See* RESTATEMENT OF PROP. § 5 cmt. c (AM. L. INST. 1936); *see also* RESTATEMENT OF TORTS § 1 cmt. d (defining "legally protected interests"). Sometimes the meaning of "interest" differed between the *Restatement of Torts* and the *Restatement of Property*, *see* RESTATEMENT OF PROP. § 5, but in this context the meaning was aligned. Some courts have interpreted the idea of "legally protected interest" narrowly to exclude property that is merely subject to negligent acts. *See, e.g.*, Lockett v. Hill, 51 P.3d 5, 6–7 (Or. Ct. App. 2002).

282. The illustrations included a hotelkeeper barging into a guest's room and defaming the guest, RESTATEMENT OF TORTS § 47, illus. 3, and a defendant mutilating the corpse of the plaintiff's wife. *Id.* § 47, illus. 4.

of damages."[283] The Tenth Circuit cited this provision in a subsequent case, *U.S. v. Hatahley*, when it affirmed an award of damages for mental injury to Navajo Indians who had their horses and burros wrongfully taken by the U.S. government.[284] So long as the defendant committed an intentional property tort, emotional distress damages were potentially available.

The *First Restatement*'s provisions on damages also suggested that intentional invasions of property interests would warrant damages for emotional harm. Section 905, *Compensatory Damages for Non-Pecuniary Harm*, confirmed in a comment that such damages were available when there is the "infringement of some other interest," and did not limit such recovery to cases of battery, assault, false imprisonment, defamation, malicious prosecution, or alienation of affections.[285]

The sections on damages for particular property torts were also in accord. Section 927, *Conversion or Destruction of a Thing or of a Legally Protected Interest Therein*, expressly allowed "the amount of any further loss suffered as the result of the deprivation."[286] The commentary noted that this language was broad enough to encompass pain and suffering.[287] Section 928, *Harm to Chattels*, addressed injury to property that was short of conversion. While it did not expressly say that damages for emotional harm were permissible, its description of damages was not exclusive,[288] and the commentary included a statement that "the plaintiff is entitled to recover for any loss of which the defendant's act is the legal cause."[289]

Other parts of the *Restatement* buttressed an interpretation that damages for emotional harm were available for intentional invasions of property interests.[290] For example, section 916 suggested the

283. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1048–50 (1936).

284. U.S. v. Hatahley, 257 F.2d 920, 924–25 (10th Cir. 1958).

285. RESTATEMENT OF TORTS § 905 cmt. c (1939).

286. *Id.* § 927.

287. *Cf. id.* § 927 cmt. l.

288. *Id.* § 928 (stating "the damages include compensation for").

289. *Id.* § 928 cmt. b; *see also id.* § 931(b) (permitting recovery for "other harm of which the detention is the legal cause").

290. *See, e.g.*, *id.* § 904 cmt. b (discussing conversion and the need to specifically plead damages other than value and interest).

availability of parasitic damages when the plaintiff suffered an intentional invasion of legally protected interests, although it simultaneously qualified their availability. An award depended upon the defendant's culpability, including the defendant's intent to cause emotional harm. This substantive limit on the availability of parasitic damages was found, surprisingly, in the damages section. Section 916, *Unintended Consequences of Intentional Invasions*, said:

> Where a person has intentionally invaded the legally protected interests of another, his intention to commit an invasion, the degree of his moral wrongfulness in acting and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended harm.[291]

"Unintended harm" included emotional harm, at least when it had a physical manifestation like illness.[292]

Section 916 was especially important when a defendant committed an intentional property tort because liability did not require moral blame. The *First Restatement* clarified the intent necessary for conversion,[293] and a defendant could be liable if the defendant acted under a reasonable mistake regarding either possession or the owner's consent.[294] Section 916 reflected the idea that recovery for emotional distress was available for property torts but only when the defendant's acts were aggravated or egregious. This principle was evident in the earlier common law cases that were influenced by the writs, required the plaintiff's harm to be a natural and probable consequence of the defendant's act, and/or used exemplary damages to compensate for emotional harm.[295]

Despite the *First Restatement*'s provisions that suggested the availability of emotional distress damages for intentional torts to property, a reader could have nonetheless reached a contrary conclusion from other provisions. Most notably, section 47, which

291. *Id.* § 916.

292. *Id*. § 916 cmt. a.

293. *See id.* § 222 cmt. d.

294. *Id.* § 244 cmt. a.

295. *See supra* Part III.A.2.

contained the permissive language and was the main substantive law provision addressing the specific issue, was inaptly titled, *Conduct Intended to Cause Bodily Harm but Causing Emotional Distress*. Obviously, conduct that intentionally harms a pet is not typically conduct intended to cause bodily harm. In addition, the commentary to section 905, *Compensatory Damages for Non-Pecuniary Harm*, seemed to differentiate between the types of emotional states for which a plaintiff could recover. Harm to or dispossession of chattels clearly permitted damages for humiliation or for "a feeling of degradation or inferiority or a feeling that other people will regard one with aversion or dislike,"[296] but not typically for "loss of companionship."[297] Also, a plaintiff could recover for fear and anxiety if the defendant's actions were more than negligent, such as when the defendant wantonly evicted the plaintiff from a residence,[298] but it was unclear whether recovery was likewise possible when only harm to chattels resulted. Similarly, while the detention of chattels (or the "loss of use") allowed a plaintiff to recover "any loss of which the defendant's act is the legal cause,"[299] a related provision only discussed economic, not emotional, harm.[300]

2. A Pet's Value

The *First Restatement* was also unclear about whether damages for the value of the animal could incorporate the loss of the human-pet bond. This ambiguity should have mattered only for cases in which parasitic damages were unavailable, such as when the defendant's conduct was merely negligent. However, the *First Restatement* never explained the relationship between the value-to-the-owner measure and parasitic damages. In addition, it expressly stated that the value-to-the-owner measure applied to intentional torts.[301]

296. *Id.* § 905 cmt. d.

297. *Cf. id.* § 905 cmt. f. (discussing situations involving a spouse, but not situations involving a pet).

298. *Id.* § 905 illus. 8; *see also id.* cmt. e (referencing section 501, which allows damages for emotional harm caused by reckless conduct in disregard of another's safety).

299. *Id*. § 928(b).

300. *See id.* § 931 & cmt. e.

301. *See id.* § 911 cmt. a ("Specific rules as to the measure of recovery where there has been a conversion or destruction of chattels or the destruction of title to land

The ambiguity about recovery for the loss of the human-pet bond arose because the *First Restatement* recognized that damages to a chattel could be a "value" more than the "exchange value" when "necessary to give just compensation."[302] The *First Restatement* defined "value" as either "exchange value or the value to the owner where this is greater than the exchange value."[303] It thereby provided a mechanism for just compensation when the exchange value was insufficient. The *First Restatement* provided the following example of when the value-to-the-owner measure was appropriate for injured property: when "a dog [is] trained only to obey one master."[304] Such a dog "will have substantially no value to others than the owner . . . . In such cases it would be unjust to limit the damages for destroying or harming the articles to the exchange value."[305] The trier of fact was to determine damages.[306] Without more, this language suggested a plaintiff could recover damages for the loss of the human-pet bond because the dog's obedience is simply one manifestation of the relationship between the dog and the owner.

But there was more. A comment to section 911 elaborated on "Peculiar Value to the Owner" and specifically excluded "sentimental value" from recovery. It said, in relevant part,

> Even where the subject matter has its chief value in its value for use by the injured person, if the thing is *replaceable*, the damages for its loss are limited to replacement value, less an amount for depreciation. If the subject matter cannot be replaced, however, as in the

or other things, are stated in § 927. This Section defines value with particular reference to that Section . . . .").

302. *Id.* § 927(a); *see also id.* § 222 cmt. h (noting the measure of damages for dispossession was "the full value of the chattel at the time of dispossession"). The rules on trespass to chattels similarly used the term "value." *See id.* § 928 cmt. a.

303. *Id.* § 911.

304. *Id.* cmt. e.

305. *Id.*

306. *Id*. § 912 cmt. c. This interpretation is not undermined by a pet illustration included for the topic of damage certainty. *See id.* § 912, illus. 1 ("A intentionally kills B's dog. No evidence is introduced as to the value of the dog. B is entitled only to nominal damages, unless the description of the dog by witnesses is such as to indicate that it has some substantial value."). In that illustration, even the owner did not testify about the dog's value. *Id.*

> case of a destroyed or lost family portrait, the owner will be compensated for its *special value* to him, as evidenced by the original cost, and the quality and condition at the time of the loss. Likewise[,] an author who with great labor has compiled a manuscript, useful to him but with no exchange value, is entitled in case of its destruction, to the value of the time spent in producing it or necessary to spend to reproduce it. *In such cases, however, damages cannot be based on sentimental value. Compensatory damages are not given for emotional distress caused merely by the loss of such things, except that in unusual circumstances damages may be awarded for humiliation caused by such deprivation, as where one is deprived of essential articles of clothing*. Where the subject matter was wantonly destroyed, punitive damages can be awarded.[307]

This comment is confusing and prompts many questions, especially as applied to pets. Is a pet replaceable? If not, is the "special value" to the owner only a pecuniary measure as determined by the item's initial cost and its "quality and condition at the time of loss" or the time invested in it?[308] If there is no "special value" in pecuniary terms, can the jury award damages for "sentimental value"?[309] Emotional distress damages are expressly allowed in "unusual circumstances," but is that limited to situations in which the plaintiff suffers humiliation?[310] If not, can nonpecuniary damages include compensation for harm to the owner's feelings when the pet had provided protection, entertainment, and/or companionship? Will the value-to-the-owner measure be "just" if sentimental value is excluded?[311]

This comment also embodies a strange logic. The very *raison d'etre* for the value-to-the-owner measure is because the market value of the item is inadequate compensation. When the commentary

307. *Id.* § 911 cmt. e (emphasis added).

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

disallows recovery for feelings of loss (presumably sadness, depression, emptiness) as part of "special value,"[312] the recovery is still inadequate for the plaintiff who actually experiences the loss. Because damages are supposed "to put an injured person in a position as nearly as possible equivalent to his position prior to the tort,"[313] excluding compensation for feelings of loss seems wrong.

The examples in this comment were also *sui generis* and they made analogizing to the pet context difficult, although not impossible. For example, an "unusual circumstance" justifying an award for humiliation was the deprivation of "essential articles of clothing," presumably because articles of used clothing are not fungible.[314] An award of damages equivalent to their replacement value would only allow the plaintiff to obtain someone else's used clothing and wearing someone else's old clothes would be humiliating. Arguably, pets are not fungible either.[315] That is why an owner's attachment to the pet is relevant to determining whether the cost of repairing the pet is "reasonable" when that cost exceeds the market value.[316] While limiting damages to a pet's market value might still allow the plaintiff to acquire another pet, and presumably without experiencing humiliation, the plaintiff could still experience longing, depression, and sadness for the former pet.[317] The concept of nonfungibility connects clothing and humiliation, on the one hand, and pets and longing, on the other. This link is logical, but not at all obvious.

312. *Id.*

313. *Id.* § 901 cmt. 1.

314. *Id.* § 911 cmt. e.

315. *See, e.g.,* McDougall v. Lamm, 48 A.3d 312, 324 (N.J. 2012) ("As these decisions demonstrate, our courts recognize that pets have a value in excess of that which would ordinarily attach to property, because unlike other forms of personal property, they are not fungible."); Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001) ("A companion dog is not a fungible item, equivalent to other items of personal property."); Hyland v. Borras, 719 A.2d 662, 664 (N.J. Sup. Ct. App. Div. 1998) ("[A] household pet is not like other fungible or disposable property . . . .").

316. *Hyland*, 719 A.2d at 664. *See supra* note 26–29 (discussing the availability of damages covering the necessary veterinary care).

317. *Cf.* Rachel Dekel et al., *Living with Spousal Loss: Continuing Bonds and Boundaries in Remarried Widows' Marital Relationships*, 61 FAM. PROCESS 674, 676 (2022) (discussing how remarriage does not lessen the sadness over the death of a first spouse for many).

Most important, the *Restatement*'s exclusion of sentimental value was too emphatic in light of the early pet cases that allowed owners to testify regarding the issue. The *First Restatement* lacks Reporter's Notes, like those that exist in the *Second* and *Third Restatement*, and so it is hard to know whether these earlier cases were even considered. The omission of Reporter's Notes was a deliberate choice, designed to enhance the final draft's status "as a definitive statement of the law."[318] At the time, Professor Archibald Throckmorton criticized the decision, noting it would "arouse some distrust with the conclusions."[319] Apart from distrust, the omission made it nearly impossible for consumers of the *Restatement* to consider "the actual judicial reasoning underlying a black letter" provision, and instead required the reader to assume "the synthetic black-letter provision" was "an accurate distillation and representation" of the case law.[320]

To be clear, I am not claiming that Professor Bohlen, the Reporter, subversively adopted the minority position, as he sometimes did,[321] or made a particular mistake, as others have identified.[322] Either conclusion would require a methodical case count, and the cases do not easily "line up."[323] Rather, I am suggesting that Bohlen may have missed cases in which sentimentality was compensated because such damages are often not obvious or discernable without examining trial transcripts.

318. Archibald H. Throckmorton, *Restatement of the Law of Torts*, 44 YALE L. J. 725, 725–26 (1935).

319. *Id.* at 726. Originally, a later treatise was supposed to supplement the *Restatement*, but this never happened because of insufficient interest. *See* John W. Wade, *The Restatement (Second): A Tribute to Its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend*, 13 PEPP. L. REV. 59, 61 (1985).

320. Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2157 (2022).

321. Wade, *supra* note 319, at 65, 68.

322. W. T. S. Stallybrass, *Restatement of the Law of Torts*, 48 HARV. L. REV. 1444, 1449 (1935) (book review) (reporting that the *Restatement* incorrectly said damage had to be proven in an action for trespass to chattels at common law in order to establish liability).

323. Wade, *supra* note 319, at 62, 65–66 ("Many court decisions are very difficult to . . . 'line up.'").

Consider, for example, the 1937 case of *Van Alstyne v. Rochester Telephone Corporation*,[324] a case prominently featured in the *Supplement* that was published shortly after the *First Restatement*.[325] In that trespass case, the telephone company was liable for the death of two dogs, Nancy, a valuable hunting dog, and Pooch, who replaced Nancy after she died.[326] Both had eaten small pieces of lead that had dropped from the telephone company's cable.[327] While the telephone company had an easement for the maintenance of its line, it did not have the "right to cast unnecessarily, or to leave in any event, articles or substances upon the premises."[328]

The plaintiff received $400 in damages for Nancy, who "had received expensive and valuable training, [and] was very proficient."[329] However, the plaintiff received only $150 for Pooch because the dog, "although still better in the field, was twelve years old,"[330] and was "nearing the end."[331] The plaintiff also recovered $19.50 in veterinary costs.[332]

Without a trial transcript, it is impossible to know whether this award compensated for any sentimentality. The plaintiff may have testified about the value of Nancy apart from her hunting skill. Notably, the plaintiff owned Pooch for less than a month at the time of Pooch's death and so a strong bond was unlikely to have developed between the two. In contrast, the plaintiff had owned Nancy for three years, and had valued her at $500, more than the other witnesses.

The *First Restatement*'s position—that sentimental value was not compensable—was clearly contrary to some cases at early common law, as the previous discussion suggests. One author even reports that awards involving sentimentality were "regularly affirmed" on

324. Van Alstyne v. Rochester Tel. Corp., 296 N.Y.S. 726, 730 (Rochester City Ct. 1937).

325. *See* AM. L. INST., RESTATEMENT IN THE COURTS: PERMANENT EDITION 633–34, 638, 649–50, 656–58, 661, 734–35, 739–42 (1945) (citing *Van Alstyne* with respect to various sections).

326. *Van Alstyne*, 296 N.Y.S. at 727.

327. *Id.*

328. *Id.* at 729.

329. *Id.* at 731.

330. *Id.*

331. *Id.*

332. *Id.* at 732.

appeal.[333] Scholars at the time were certainly questioning the ungenerous authority.[334] But the *First Restatement* mentions none of this.

In sum, the *First Restatement* was unclear about whether a plaintiff could recover for loss of the human-pet bond as part of the value-to-the-owner measure, although its language on sentimentality suggested the answer was no. It was also silent about the relationship between the value-to-the-owner measure and the provisions that suggested parasitic damages were available in intentional tort cases. These ambiguities undercut the *Restatement*'s purpose, i.e., to further the clarification and simplification of the law.[335] In addition, to the extent the *First Restatement* intended to foreclose recovery for the loss of the human-pet bond, at least perhaps in negligence cases, the *First Restatement* never explained why this was the right approach,[336] especially in light of the *First Restatement*'s goal that tort law afford "just compensation."[337]

Over time, courts viewed the *First Restatement*'s enigmatic value-to-the-owner measure restrictively, thereby hampering plaintiffs' recovery for loss of the human-pet bond. In 2009, one court reported, "The majority of courts that apply the value to owner measure of damages for an injured or killed pet decline to include the pet's sentimental value to its owner (the element of damages most similar to . . . emotional distress damages . . .)."[338] The court cited the *Second Restatement*'s commentary to section 911 as support.[339] That

333. *See, e.g.*, David Linn, *Damages for Loss of Personal Property with Little or No Market Value*, 3 AM. JUR. PROOF OF FACTS 3D 171 § 3 (2024).

334. *See supra note* 160 and accompanying text.

335. *See supra note* 12 and accompanying text.

336. *Cf.* Wade, *supra* note 319, at 68 (noting the *First Restatement* was mostly descriptive); Abraham & White, *supra* note 272, at 336 (arguing that the *First Restatement* lacked a theory "that explained why there was no tort liability when there was not").

337. RESTATEMENT OF TORTS § 927(a) (AM. L. INST. 1939). *Cf.* Stallybrass, *supra* note 322, at 1444–45 (mentioning the goal of reflecting morality).

338. Kaufman v. Langhofer, 222 P.3d 272, 277 n.9 (Ariz. Ct. App. 2009) (negligence claim). Some intentional tort cases also say that damages should exclude sentimental value. *See, e.g.*, Mitchell v. Heinrichs, 27 P.3d 309, 313–14 (Alaska 2001).

339. *Kaufman*, 222 P.3d at 277 n.9.

commentary essentially repeated the language in section 911 of the *First Restatement* and offered no further elaboration.[340]

Courts that later disallowed damages for sentimental value[341] or loss of companionship[342] gave "special value" a limited and artificial meaning. For example, in *Mitchell v. Heinrichs*, the Alaska Supreme Court held "the cost of immunization, the cost of neutering the pet, and the cost of comparable training" were appropriate considerations.[343] Similarly, the California Court of Appeals, in *McMahon v. Craig*,[344] said that a dog's "peculiar value" to the owner only referred to "an item's characteristics that enhance its economic value to the owner."[345]

Yet not all courts applied the value-to-the-owner measure so grudgingly. The ambiguities in the *First*, and later the *Second*, *Restatement* about whether the value-to-the-owner measure excluded damages for loss of the human-pet bond, and the absence of a convincing rationale for why it should do so, may have encouraged these other courts to reject the majority approach, even in negligence cases.

For example, the heavily cited case *Brousseau v. Rosenthal*[346] was described by Dan Dobbs as a case in which "value to the owner"

340. RESTATEMENT (SECOND) OF TORTS § 911 cmt. e (AM. L. INST. 1979) (stating "special value" did not cover an emotional response to an item's loss, with an exception for "exceptional circumstances").

341. *See, e.g.*, Stettner v. Graubard, 368 N.Y.S.2d 683, 684 (Harrison City Ct. 1975) ("Sentiment, however, may not be considered since that often is as much a measure of the owner's heart as it is of the dog's worth."); Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985) ("The superior court correctly held that the Richardsons' subjective estimation of [the pet's] value . . . was not a valid basis for compensation."); McDonald v. Ohio State Univ. Veterinary Hosp., 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994) (holding that a pet's value is its market value); Pickford v. Masion, 98 P.3d 1232, 1235 (Wash. Ct. App. 2004) (reasoning that previous courts awarded damages not for sentimental value but for emotional distress).

342. *See, e.g.*, Zager v. Dimilia, 524 N.Y.S.2d 968, 969 (Vill. Ct. 1988) (mentioning that the court could not determine the intrinsic value of the plaintiff's dog related to companionship).

343. *Mitchell*, 27 P.3d at 314.

344. McMahon v. Craig, 97 Cal. Rptr. 3d 555, 567 (Ct. App. 2009).

345. *Id.* at 558, 566–67 (claim for negligence) (citing RESTATEMENT (SECOND) OF TORTS § 911 cmt. e); *see also* Barking Hound Vill., LLC v. Monyak, 787 S.E.2d 191, 197–98 (Ga. 2016) (refusing to allow the value-to-the-owner measure if the animal had any market value at all, even if the value to the owner was higher).

346. Brousseau v. Rosenthal, 443 N.Y.S.2d 285 (Civ. Ct. 1980).

was a "fiction" used to allow recovery for emotional damages from loss of companionship.[347] *Brousseau* was a small claims action for negligence.[348] Ms. Brousseau boarded her "healthy, eight year old" "part-German Shepherd" at the defendant's kennel.[349] Approximately two weeks later, when she returned, her dog was dead.[350] In calculating damages, the court noted that "Ms. Brousseau's dog was a gift and a mixed breed and thus had no ascertainable market value," but that "need not limit plaintiff's recovery to a merely nominal award."[351] In computing the "actual value to the owner," the court noted the emotional harm suffered by the plaintiff because she lost her companion.[352] She "suffered a grievous loss."[353] She had received the dog when it was a puppy, shortly after her husband's death.[354] Ms. Brousseau was retired, lived alone, and "this pet was her sole and constant companion."[355] She claimed the dog's loss caused her psychological trauma.[356] In addition, the court noted that the dog protected the plaintiff and provided her peace of mind.[357] Ms. Brousseau "relied heavily on this well-trained watch dog and never went out into the street alone at night without the dog's protection."[358] Since the dog's death, she stayed in after dark and her home was burglarized.[359] The court awarded her $550 plus costs and disbursements as compensation.[360] It refused to reduce the award

347. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 475 (2d ed. 1993).

348. *Brousseau*, 443 N.Y.S.2d at 285.

349. *Id.*

350. *Id.*

351. *Id*. at 286.

352. *Id*.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 287.

because the dog was old.[361] It said, "'manifestly, a good dog's value increases rather than falls with age and training.'"[362]

Similarly, in *Anzalone v. Kragness*, an Illinois appellate court allowed the plaintiff's lawsuit for the death of her cat to continue even though her demand for $100,000 was excessive.[363] The cat was attacked by a rottweiler when it was being boarded at the defendants' facility.[364] The claim sounded in negligence and bailment.[365] While damages for loss of companionship were not available for the negligent killing of a pet because "a pet 'is an item of personal property,'"[366] value-to-the-owner damages were available when the fair market value is unjust. Noting that "most jurisdictions" allow a value-to-the-owner measure,[367] it found Illinois law permitted "some element of sentimental value," although damages were still "'severely circumscribed.'"[368] In discussing the value to the owner, the appellate court mentioned that "Plaintiff was a 44-year-old unmarried woman with no children. She considered Blackie, her four-year-old female cat, a member of her family. Plaintiff 'loved and cared for Blackie, Blackie reciprocated that affection, and [plaintiff] cherished Blackie for the unconditional love and companionship she provided.'"[369] The appellate court acknowledged that the actual-value-to-the-owner measure allowed recovery for what was, in reality, emotional distress.[370]

By essentially permitting parasitic damages for emotional harm in negligence cases involving pets, *Brousseau v. Rosenthal* and *Anzalone v. Kragness* blurred the lines between negligence and intentional tort cases. While line blurring helped the plaintiffs in *Brousseau* and *Anzolone*, it eventually worked against plaintiffs with

361. *Id.*

362. *Id.* (quoting Stenner v. Graubard, 368 N.Y.S.2d 683, 685 (Harrison City Ct. 1975)).

363. Anzalone v. Kragness, 826 N.E.2d 472, 475 (Ill. App. Ct. 2005).

364. *Id.*

365. *Id.*

366. *Id.* at 476 (quoting Janoski v. Preiser Animal Hospital, Ltd., 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987)).

367. *Id.* at 477.

368. *Id.* (citing *Jankoski*, 510 N.E.2d at 1087).

369. *Id.* at 474.

370. *Id.* at 477–78.

intentional tort claims. So did the cryptic language of section 911, and the unclear relationship between the liability and remedial provisions. All of this set the stage for the *Second Restatement*'s implicit rejection of parasitic damages in intentional tort cases involving pets.

C. The Restatement (Second) of Torts

The *Restatement (Second) of Torts* was partially published in 1965 and fully published in 1977.[371] The reporters were William Prosser and John Wade. It continued to use animals in many of its examples, including in its examples of conversion and trespass to chattels.[372]

The *Second Restatement* made recovery for loss of the human-pet bond more difficult for plaintiffs by its elimination of the *First Restatement*'s section 47(b) and its inclusion of the new tort of IIED in section 46. Section 911—that indicated there was no recovery for sentimental value when property was harmed—remained largely the same and buttressed a more restrictive approach to recovery for emotional harm following an intentional tort that injured or killed a pet.

1. Parasitic Mental Distress Damages for Intentional Torts to Property

Section 47(b) in the *First Restatement* had indicated that mental distress damages could be parasitic to an intentional property tort.[373] Calvert Macgruder explained that section 47(b) was meant to *increase* recovery.[374] After publication of the *First Restatement*, and before the publication of the *Second Restatement*, the case law confirmed the

371. Harvey S. Perlman & Gary T. Schwartz, *General Principles*, 10 KAN. J.L. & PUB. POL'Y 8, 8 (2000).

372. *See* RESTATEMENT (SECOND) OF TORTS § 217 cmt. e (AM. L. INST. 1965) (discussing "beat[ing] another's horse or dog" and deliberately driving or frighting a "herd of sheep . . . down a declivity"); *id.* § 226 cmt. b ("intentionally shoots and kills the horse which the plaintiff is riding"); *id*. § 226 cmt. d. ("If a horse is permanently lamed"); *id*. § 226 illus. 4 ("A intentionally feeds poisonous weeds to B's horse.").

373. *See supra* notes 280–84 and accompanying text.

374. Magruder, *supra* note 283, at 1059.

availability of emotional distress damages in the intentional tort context.[375]

But the *Second Restatement* made that outcome *less* certain. Most significantly, the *Second Restatement* eliminated section 47(b), which expressly permitted emotional distress damages for an intended or likely invasion of legally protected interests, including an intentional tort to property.[376] The section was removed to enhance consistency with the damage provisions.[377] Yet, the removal of section 47(b) did not fix the inconsistencies *within* and *between* the damage provisions. For example, neither the black letter law of section 927, *Conversion or Destruction of a Thing or of a Legally Protected Interest in It,* nor section 928, *Damages for Harm to Chattels Not Amounting to Conversion*, mentioned mental distress damages, but section 929, *Harm to Land from Past Invasions*, explicitly did.[378] No comments in those sections elaborated further on the distinction in the black letter.[379] To make matters worse, the commentary to section 927 suggested mental anguish *was* recoverable for conversion of a chattel. Section 927's comment *m* on "further loss" said,

375. *See infra* notes 382–422 and accompanying text.

376. *Compare* RESTATEMENT OF TORTS § 47 (1934), *with* RESTATEMENT (SECOND) OF TORTS § 47 (1965). Section 47 in the original *Restatement* said:

> Except as stated in §§ 21 to 34, (a) conduct which is tortious because intended or likely to result in bodily harm to another or in the invasion of any other of his legally protected interests does not make the actor liable for an emotional distress which is the only legal consequence of his conduct; (b) if the actor has by his tortious conduct become liable for an invasion of any legally protected interest of another, emotional distress caused by the invasion or by the tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other.

RESTATEMENT OF TORTS § 47 (1934).

377. RESTATEMENT (SECOND) OF TORTS § 47 reporter's notes (1965).

378. *Id.* § 929 cmt. e.

379. Admittedly, at common law, trespass to land traditionally allowed damages for mental harm. *See supra* note 181. But some cases were contrary, see *id.* § 929 reporter's note cmt. e (citing Gregath v. Bates, 359 So. 2d 404 (Ala. Ct. App. 1978) (requiring malice, insult, inhumanity or a physical injury for recovery of mental harm)). Moreover, the common law at times also allowed damages for mental harm after injury to a pet. *See supra* Part III.A; *see also infra* notes 383–422 and accompanying text.

> The person entitled to the value of a thing taken or destroyed by a tortfeasor is entitled to recover for any further loss suffered by him as the result of the deprivation, subject to the rules stated in §§ 912 and 917 as to certainty and causation . . . . *If the deprivation is the legal cause of harm to the feelings, damages may be allowable for the harm*, as when the defendant intentionally deprives the plaintiff of essential household furniture, which humiliates the plaintiff, a result that the defendant should have realized would follow.[380]

The removal of section 47(b) must have left readers confused about the *Restatement*'s position on the availability of parasitic damages for intentional property torts. The commentary to section 927 seemed to suggest that parasitic damages were still available for intentional harm to property. In addition, a new example in section 47, *Conduct Intended to Invade Other Interests but Causing Emotional Distress*, involved a pet. Illustration 2 read as follows: "A, who is annoyed by the barking of B's pet dog, shoots at the dog intending to kill it. He misses the dog. B suffers severe emotional distress. A is not liable to B."[381] The point of the example is that the defendant evades liability for emotional distress damages when the defendant intends to invade the plaintiff's legally protected interests but the property is not harmed. But presumably, the example also suggests the opposite when the property is harmed.

Any confusion was magnified by the Reporter's failure to include in the Reporter's Notes the many cases in which courts awarded

380. RESTATEMENT (SECOND) OF TORTS § 927 cmt. m (1979) (emphasis added). The Reporter cited several cases in support of that comment, although none involved a pet. *Id.* § 927 reporter's note cmt. m. Like the *First Restatement*, the *Second Restatement* had additional provisions that indirectly suggested emotional distress damages were available for harm to property, at least sometimes. *See, e.g.*, *id.* § 905 cmt. d, illus. 5.

381. *See id.* § 47 illus. 2. The *First Restatement* had a similar provision, but none of the illustrations involved a pet. RESTATEMENT OF TORTS § 47 (1934).

mental distress damages after a pet was intentionally harmed. Three significant intentional tort cases were absent, as well as others.[382]

The first important case was *Fredeen v. Stride*, decided by the Oregon Supreme Court.[383] The plaintiff's German Shepherd dog, Prince, was shot in the back leg while allegedly chasing sheep, and the plaintiff brought Prince to the veterinarian, who recommended that the dog be put down.[384] The plaintiff agreed.[385] However, instead of euthanizing the dog, the veterinarian gave it away.[386] The plaintiff then saw the dog on the street with the dog's new owner.[387] The new owner denied that the dog was Prince, although the veterinarian conceded the dog was, in fact, Prince.[388] The plaintiff then sued the veterinarian and the new owner, seeking among other things, damages for mental anguish.[389]

The trial court instructed the jury that both defendants were guilty of conversion as a matter of law.[390] The jury returned a verdict against both defendants and awarded $500 for conversion of the dog, $4,000 for mental anguish, and $700 for punitive damages.[391] On appeal, the Supreme Court of Oregon said,

382. *See, e.g.*, Corso v. Crawford Dog & Cat Hosp., Inc, 97 Misc. 2d 530, 531 (N.Y. Civ. Ct., 1979) (allowing recovery for mental anguish after wrongful destruction of dog's body); City of Garland v. White, 368 S.W.2d 12, 17 (Tex. Ct. App. 1963) (affirming award for mental pain and suffering arising out of police officer's unlawful killing of pet dog in plaintiff's garage); Brown v. Crocker, 139 So. 2d 779, 781–82 (La. Ct. App. 1962) (affirming emotional distress damages for shooting of a pet mare and noting "The evidence discloses a very close attachment, fondness, and affection of the minor for his horse."). Admittedly, an illustration involving humiliation referred, *inter alia*, to an animal case. RESTATEMENT (SECOND) OF TORTS § 905 reporter's note, illus. 5 (citing Wilson v. Kuykendall, 73 So. 344, 344 (Miss. 1916)). That case involved taking the plaintiff's mule but also a trespass to land, and there was no indication that the plaintiffs had any particular affection for the mule. *Wilson*, 73 So. at 344.

383. Freeden v. Stride, 525 P.2d 166 (Or. 1974).

384. *Id.* at 168.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 168–69.

390. *Id.* at 168.

391. *Id.* at 167.

> Ordinarily a conversion does not cause the property owner sufficient mental anguish to merit an award of damages for pain and suffering and the amount of damages is limited to the value of the property converted. However, if mental suffering is the direct and natural result of the conversion, the jury may properly consider mental distress as an element of damages. 4 Restatement of Torts s 927, Comment L, states, at 657: "If the deprivation is the legal cause of harms to the feeling, damages may be allowable for such harms, as where the defendant intentionally deprives the plaintiff of essential household furniture which humiliates the plaintiff, a result which the defendant should have realized would follow." Although it is not necessary that the act constituting conversion of plaintiff's property be inspired by fraud or malice, mental suffering is a proper element of damages where evidence of genuine emotional damage is supplied by aggravated conduct on the part of the defendant.[392]

Although the appellate court affirmed the awards for mental anguish and punitive damages against the veterinarian, it reversed such awards against the new owner.[393] The wrongfulness of the defendants' actions distinguished the outcomes: "[The new owner's] action was taken on the strength of information supplied by Dr. Stride's assistants, and her motivation under the circumstances was entirely benevolent. She did not intend to deprive the plaintiff of the dog[,] nor did she act in conscious disregard of plaintiff's property rights."[394] Although the court did not cite section 916,[395] its decision was consistent with it.

The second notable case was *U.S. v. Hatahley*. Navajo Indians sued the U.S. government when agents from the Bureau of Land Management wrongfully seized and destroyed the plaintiffs' horses and burros as part of an effort to rid the public range of trespassers. *U.S. v. Hatahley* is a notable case for many reasons, including because the U.S.

392. *Id.* at 168 (citations omitted).

393. *Id.* at 170.

394. *Id.* at 169.

395. *See supra* note 291 and accompanying text; *Freeden*, 525 P.2d at 166.

Supreme Court held that the Bureau of Land Management was liable under the Federal Tort Claims Act.[396] This "was the first time American Indians had successfully sued the government for intentional wrongdoing."[397]

Hathaley is also important because the plaintiffs could recover for their emotional harm resulting from the injury to their animals. The trial court awarded the plaintiffs $100,000 jointly, and this included damages for mental pain and suffering.[398] The trial judge found that the U.S. government had acted with malice, as evidenced by the "brutal handling and slaughter of their livestock," and referred to the defendants and their acts "as 'horrible', 'monstrous', 'atrocious', 'cruel', 'coldblooded depredation', and 'without a sense of decency.'"[399]

The U.S. Supreme Court held for the plaintiffs on the question whether the defendants had complied with certain statutory notice provisions, but the Court remanded on the issue of damages.[400] The trial court had erred by awarding the amount requested in the complaint, $100,000, with no differentiation between the thirty plaintiffs.[401] The plaintiffs may have owned varying numbers of horses and burros, valued them differently, and experienced different amounts of pain and suffering.[402]

On remand, the trial court awarded each individual $3,500 for pain and suffering as well as other damages.[403] A subsequent appeal ensued, and the Tenth Circuit agreed that damages for pain and suffering were appropriate, citing the *First Restatement*, sections 46 and 47.[404] It concluded, "While damages for mental pain and suffering, where there has been no physical injury, are allowed only in extreme

396. Hatahley v. United States, 351 U.S. 173, 181 (1956).

397. Debora L. Threedy, United States v. Hatahley*: A Legal Archaeology Case Study in Law and Racial Conflict*, 34 AM. INDIAN L. REV. 1, 7–8 (2009) (citing Nancy C. Maryboy & David Begay, *The Navajos of Utah, in* A HISTORY OF UTAH'S AMERICAN INDIANS 265, 301 (Forrest S. Cuch ed., 2000)).

398. *Hatahley*, 351 U.S. at 174, 182.

399. U.S. v. Hatahely, 257 F.2d 920, 925 (10th Cir. 1958).

400. *Hatahley*, 351 U.S. at 182.

401. *Id.*

402. *Id.*

403. *Hatahely*, 257 F.2d at 922.

404. *Id.* at 922, 925.

cases, they may be awarded in some circumstances."[405] It specifically mentioned that "after the animals were taken, [the plaintiffs] were 'sick at heart, their dignity suffered, and some of them cried.' There was considerable evidence that some of the plaintiffs mourned the loss of their animals for a long period of time."[406] However, the Tenth Circuit remanded again for a more individualized determination of the plaintiffs' pain and suffering.[407]

The third significant case was the Florida Supreme Court's 1964 decision in *La Porte v. Associated Independents, Inc.*[408] The plaintiff suffered hysteria after witnessing a garbage collector throw a garbage can at Heidi, her purebred miniature dachshund who was tied up at the time.[409] "Upon hearing her pet yelp, the [plaintiff] went outside to find Heidi injured. The collector laughed and left."[410] Heidi died from the incident.[411] Despite the fact that the plaintiff only paid $75 for the puppy, the jury awarded her $2,000 compensatory damages and $1,000 punitive damages for the willful and malicious killing of her dog.[412] The jury was instructed that it could award the plaintiff damages for her mental distress.[413]

The defendant appealed, initially prevailing before the District Court of Appeals.[414] That court noted that damages could not include "an allowance for sentimental value of the dog to its owner," although damages were not limited to the market value and could reflect the special value to the owner.[415] Only experts, however, could testify to issues of value.[416] Nor were damages for mental suffering separately recoverable.[417] Consequently, the intermediate appellate court held

405. *Id.* at 925.

406. *Id.*

407. *Id.*

408. La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964); Associated Indeps., Inc. v. La Porte, 158 So. 2d 557, 557 (Fla. Dist. Ct. App. 1963).

409. *La Porte*, 163 So. 2d at 267–68.

410. *Id.* at 268.

411. *Id.*

412. *Associated Indeps.*, 158 So. 2d at 557–58.

413. *La Porte*, 163 So. 2d at 268.

414. *Id.*

415. *Id.* at 558.

416. *Id.*

417. *Id.*

that "the trial judge, under the particular facts of this case, should not have included the element of mental suffering as one to be considered by the jury in assessing damages."[418]

The Florida Supreme Court quashed the intermediate court's decision, holding that emotional distress damages were recoverable.[419] It did not say the value-to-the-owner measure included sentimental value, but rather embraced emotional distress damages as independently appropriate. In so doing, it noted the potential overlap between the two concepts:

> The restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept. Without indulging in a discussion of the affinity between "sentimental value" and "mental suffering", we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal because of its special training such as a [s]eeing [e]ye dog or sheep dog.[420]

The Florida Supreme Court emphasized that the defendant's act was malicious, as indicated by the award of punitive damages. Its analysis was consistent with section 916,[421] although the court cited to another provision of the *First Restatement* that it thought made malice relevant.[422]

The *Second Restatement* made no mention of *Fredeen v. Stride* or *La Porte v. Associated Independents, Inc.* It cited *U.S. v. Hatahley* three times, but not once for its position on the availability of emotional

418. *Id.*

419. *La Porte,* 163 So. 2d at 269.

420. *Id.*

421. *See supra* note 291 and accompanying text.

422. *La Porte,* 163 So. 2d at 267, 269. The court cited to *Kirksey v. Jernigan*, 45 So. 2d 188, 189 (Fla. 1950), which had cited § 47(b) in the *First Restatement* for that proposition. However, section 47(b) itself did not require malice.

distress damages.[423] These cases, from three prominent courts, should have prompted language in the *Second Restatement* that emotional distress damages could be parasitic to an intentional tort involving a pet. Such language was needed, as courts were confused about how the section on value affected parasitic damages. Recall in *La Porte*, the Florida District Court of Appeals thought the provision on value dictated the result in the intentional tort context, foreclosing recovery for emotional distress damages altogether. But, unfortunately, the *Second Restatement* did not clarify the issue. While the *Second Restatement* included an illustration on the *unavailability* of mental distress damages when the defendant tried but failed to harm a pet, it lacked an illustration on the *availability* of pain and suffering damages when the defendant succeeded.[424]

The removal of section 47(b) and the failure to make express the availability of parasitic damages for an intentional invasion of property interests contributed to courts' different approaches to the issue in the years following. Some courts allowed such compensation after an intentional tort, emphasizing the difference between negligence and an intentional tort. For example, in *Plotnik v. Meihaus*, the plaintiff recovered damages for mental harm after a neighbor used a bat to hit the plaintiff's dog, a twelve to fifteen pound miniature pinscher named Romeo, when the dog ran onto the neighbor's property.[425] The battery caused Romeo to squeal and walk with difficulty.[426] Surgery repaired Romeo's right rear leg, but he needed a stroller to get around after surgery.[427] The jury found the defendant intentionally harmed Romeo and for the trespass awarded damages of approximately $2,800 for economic loss as well as $20,000 for one plaintiff's emotional distress and $30,000 for another plaintiff's emotional distress.[428] The jury also awarded emotional distress damages of $16,150 to one plaintiff and $30,000 to the other for the

423. *See* RESTATEMENT (SECOND) OF TORTS § 895A (AM. L. INST. 1979); *id.* § 901 reporter's note (listing cases concerning the general theory of compensation in tort actions); *id.* § 911 reporter's note cmt. b (Market Value).

424. *See supra* note 381 and accompanying text.

425. Plotnik v. Meihaus, 146 Cal. Rptr. 3d 585, 592 (Ct. App. 2012).

426. *Id.* at 592–93.

427. *Id.* at 593.

428. *Id.*

defendant's negligence.[429] The California Court of Appeals upheld the recovery of emotional distress damages, but only with respect to the trespass to chattels claims.[430] It noted that any legal limits on the availability of emotional distress damages for negligence "do not apply when distress is the result of a defendant's commission of the distinct torts of trespass, nuisance, or conversion."[431]

Similarly, in *Womack v Von Rardon*, the appellate court affirmed a default judgment that awarded the plaintiff $5,000 in general damages for emotional distress for the death of her cat.[432] The defendants, all minors, had set fire to the cat using gasoline.[433] The cat was badly injured and needed to be euthanized.[434] Ms. Womack appealed, claiming the damages were insufficient and that the trial court should not have dismissed her claim for the tort of outrage.[435] The appellate court affirmed the amount of compensation because the plaintiff failed to prove a different amount, and it also affirmed the dismissal of the intentional infliction of emotional distress ("IIED") claim.[436] Importantly, the plaintiff's ability to recover for her emotional harm was affirmed: "For the first time in Washington, we hold malicious injury to a pet can support a claim for, and be considered a factor in measuring a person's emotional distress damages."[437] The court noted an award of emotional distress damages is "consistent with actual and intrinsic value concepts"[438] even though an earlier case had held the measure could not include "sentimental value."[439] The *Womack* court distinguished the earlier case on the ground that the behavior in *Womack* was malicious and the behavior in the other case was negligent.[440]

429. *Id.* at 593–94.

430. *Id.* at 601.

431. *Id.*

432. Womack v. Von Rardon, 135 P.3d 542, 543 (Wash. Ct. App. 2006).

433. *Id.*

434. *Id.*

435. *Id.* at 544.

436. *Id.* at 545–46.

437. *Id.* at 546.

438. *Id.*

439. Pickford v. Masion, 98 P.3d 1232, 1235 (Wash. Ct. App. 2004) (citing Mieske v. Bartell Drug Co., 593 P.2d 1308, 1311 (Wash. 1979)).

440. *Womack*, 135 P.3d at 546.

But simultaneously, other courts denied parasitic damages for emotional distress accompanying the intentional injury to a pet.[441] *Scheele v. Dustin*, the case discussed at the beginning of this Article, illustrates that sometimes no theory helped a plaintiff, even for allegedly malicious acts.[442] Often the rejection of parasitic damages for an intentional tort coincided with the court's embrace of the tort of IIED, as discussed next.

2. Intentional Infliction of Emotional Distress

A plaintiff whose pet is intentionally injured should not need to rely on a claim for standalone emotional harm.[443] It would be otherwise if the pet were only threatened with injury and this threat caused the plaintiff's emotional distress. Illustration 2 accompanying section 47, mentioned above, suggested as much.[444] Nonetheless, the *Second Restatement*'s new tort of IIED became an additional hurdle for plaintiffs whose pets were intentionally harmed.

The tort of IIED first appeared in the 1948 supplement, underwent revision, and then finally appeared in its current form in 1965.[445] Known as the tort of outrage, it allows recovery for severe emotional distress caused by the defendant's extreme and outrageous conduct. Others have explained well the reason the Institute added section 46 to the *Restatement*.[446]

441. *See, e.g.*, Myers v. City of Hartford, 853 A.2d 621, 626 (Conn. Ct. App. 2004).

442. *See supra* notes 51–65 and accompanying text; *see, e.g.*, Johnson v. Douglas, 723 N.Y.S.2d 627, 628 (2001); Pantelopoulos v. Pantelopoulos, 869 A.2d 280, 283–84 (Conn. Super. Ct. 2005).

443. *Cf.* Mooney v. Johnson Cattle Co., Inc., 634 P.2d 1333, 1336 n.7 (Or. 1981) (criticizing the trial court for relying on cases for standalone emotional distress when "an independent basis of liability exists, irrespective of whether there existed physical injuries").

444. *See supra* note 381 and accompanying text.

445. RESTATEMENT OF THE LAW: 1948 SUPP. ch. 2, topic 5, § 46 (AM. L. INST. 1948); RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

446. *See, e.g.*, J.L. Borda, *One's Right to Enjoy Mental Peace and Tranquility*, 28 GEO. L. J. 55, 56 (1939); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 880 (1939).

This tort was intended to be a "gap filler."[447] Some feared that the new tort might expand liability inappropriately, "circumvent[ing] the limitations placed on the recovery of mental anguish damages under more established tort doctrines."[448] Few people probably imagined, however, that the new tort would *retract* liability, although William Prosser had criticized courts for awarding parasitic damages for intentional torts to property,[449] calling a trespass "the barest excuse to permit recovery for the real mental injury, which is the only substantial damage to be found."[450] Retraction, however, was the ultimate result. Courts started addressing recovery for the loss of the human-pet bond by applying the new tort instead of simply allowing parasitic damages for a conversion or trespass to chattels when the jury found aggravated circumstances.

The *Second Restatement*'s Illustration 11 to section 46 was responsible for this result. It stated,

> A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.[451]

Of course, B did not need the new tort to recover for her emotional distress. The injury to her pet was a conversion, and apparently a malicious one, and emotional distress damages should have been considered parasitic to the intentional tort.

Most courts embraced the new tort and applied it when pets were injured or killed, using it as the vehicle to award damages for emotional

447. *See* Standard Fruit & Vegetable Co., Inc. v. Johnson, 985 S.W.2d 62, 67–68 (Tex. 1998); Banks v. Fritsch, 39 S.W.3d 474, 481 (Ky. Ct. App. 2001).

448. *See, e.g.*, *Standard Fruit*, 985 S.W.2d at 68.

449. *See* Prosser, *supra* note 446, at 880, 884.

450. *Id*.

451. *See* RESTATEMENT (SECOND) OF TORTS § 46 illus. 11 (AM. L. INST. 1965). This example was omitted from the *Third Restatement*. *See infra* note 574 and accompanying text.

harm.[452] *Burgess v. Taylor* reflects this approach.[453] The Kentucky Court of Appeals started the opinion with the following: "This appeal questions whether the tort of intentional infliction of emotional distress can apply to the conversion and slaughter of pet horses."[454] The court answered affirmatively.[455] In *Burgess*, the plaintiff had given her horses, Poco and P.J., whom she loved like children,[456] to the Burgesses for care, but never transferred ownership of the horses or abandoned them.[457] Not long thereafter, Ms. Burgess sold the horses for $1,000 to a slaughter buyer, and the horses were killed.[458] The jury awarded the plaintiff $1,000 for the fair market value of the horses, $50,000 in compensatory damages for the outrageous conduct, and $75,000 in punitive damages.[459] The appellate court rejected the defendants' argument that "the proper award of damages for the loss or damage to an animal is the value of that animal, not emotional damages for that loss."[460] But it made clear that the plaintiff's recovery was contingent on satisfying the elements of IIED, not as a byproduct of proving conversion.

As previously mentioned, Dean Prosser, a vigorous proponent of section 46, wanted courts to analyze claims for emotional distress under the tort of outrage and not conversion or trespass, at least when the trespass was "technical."[461] Prosser was concerned that intentional torts could occur with very little moral culpability and sufficient wrongfulness might not justify emotional distress damages.[462] Prosser's argument, however, ignored the fact that the common law required moral culpability for parasitic pain and suffering damages,

452. Yet some courts rejected every avenue of recovery for loss of the human-pet bond, including this one. *See* Pantelopoulos v. Pantelopoulos, 869 A.2d 280, 283–84 (Conn. Super. Ct. 2005).

453. Burgess v. Taylor, 44 S.W.3d 806, 809 (Ky. Ct. App. 2001).

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.* at 809–10.

459. *Id.* at 810.

460. *Id.* at 812–13.

461. Prosser, *supra* note 446, at 892; *see also supra* notes 449–50 and accompanying text.

462. *Id.* at 889.

with courts sometimes also requiring that the distress be a "natural and probable consequence."[463] After all, both the *First* and *Second Restatement*, in sections 916 and 435B respectively,[464] discouraged the availability of emotional distress damages for intentional torts in cases without moral wrongdoing. Unfortunately, the renumbering of this important provision in the *Second Restatement* housed it with sections related to negligence.[465]

In hindsight, it is somewhat ironic that Prosser wrote in 1957, "Conversion is the forgotten tort. Few courts or law professors have had any interest in it."[466] It was his advocacy for the tort of outrage that helped deemphasize conversion, at least in the pet context. The Institute, in adopting section 46, said it "expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress."[467] Those other circumstances had included conversion and trespass to chattels, although IIED now overshadowed those torts.

Illustration 11 created what F. Andrew Hessick has called a "doctrinal redundancy."[468] Redundancies give a court "a greater ability . . . to achieve the outcome it desires."[469] IIED gave judges another doctrinal tool by which they could control whether a jury would be able to award emotional distress damages to a plaintiff. In fact, some judges even recharacterized the underlying claims for harm to a pet as negligence in order to bypass parasitic damages and force the plaintiff

463. *See, e.g.*, Medlock v. Farmers State Bank of Texas Cnty., 696 S.W.2d 873, 880 (Mo. Ct. App. 1985) (discussing a "long established limitation" of requiring intentional wrongdoing before damages for emotional harm were available for a wrongful foreclosure).

464. *See supra* note 291 and accompanying text; *see also* RESTATEMENT (SECOND) OF TORTS § 435B (1965) ("Where a person has intentionally invaded the legally protected interests of another, his intention to commit an invasion, the degree of his moral wrong in acting, and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended harm").

465. *Compare* RESTATEMENT OF TORTS § 916 (AM. L. INST. 1939), *with* RESTATEMENT (SECOND) OF TORTS § 435B (1965).

466. Prosser, *supra* note 162, at 168.

467. *See* RESTATEMENT (SECOND) OF TORTS § 46 caveat.

468. F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635, 636 (2016).

469. *Id.* at 668.

to establish IIED. For example, in *Richardson v. Fairbanks North Star Borough*, the plaintiffs' pet dog, Wizzard, was mistakenly killed by an employee of the borough's animal shelter.[470] By statute, the pound was supposed to keep dogs seventy-two hours before killing them, but Wizzard was killed within forty-eight hours after arrival and after the shelter knew his owners would come to retrieve him.[471] The owners, in fact, had tried to retrieve Wizzard the day before the killing, but the employees disallowed it because the plaintiffs arrived ten minutes before closing.[472] The jury awarded the plaintiffs $300 but ordered the plaintiffs to pay the borough's costs and attorney's fees because the borough's offer of judgment had been higher.[473] The plaintiffs appealed, claiming, *inter alia*, that the damages were insufficient because the award did not acknowledge the dog's value to them as a pet or their pain and suffering.[474]

The Alaska Supreme Court rejected the plaintiffs' appeal, ruling that the market value of the dog was the proper measure of damages.[475] It characterized the shelter's action as negligent, noting the shelter's poor record keeping.[476] The court's characterization of the borough's action as negligent then required the plaintiff to use section 46 to obtain emotional distress damages. Despite acknowledging that "the loss of a beloved pet can be especially distressing in egregious situations,"[477] it denied the claim for IIED because "the severity of the Richardsons' emotional distress did not warrant [it]."[478]

The Alaska Supreme Court improperly focused on the borough's negligence.[479] The borough intentionally exercised

470. Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 455 (Alaska 1985).

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.* at 455–56.

475. *Id.* at 456.

476. *Id.* at 455.

477. *Id.* at 456.

478. *Id.* at 456–57.

479. *Compare* Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985), *with* Daughen v. Fox, 539 A.2d 858, 860, 864 (Pa. Super. Ct. 1988) (correctly holding that a veterinarian's alleged acts that harmed the pet were not trespass—as plaintiff's alleged—but negligence and applying IIED to determine whether the plaintiffs could recover for their emotional distress).

substantial dominion over the dog in a way that was inconsistent with the owners' property rights. While the borough may have done so negligently, the euthanasia was an intentional act. The defendant's mistake should not have affected the availability of the conversion tort.[480] Rather, the jury should have considered the defendant's "intention to commit an invasion, the degree of his moral wrong in acting, and the seriousness of the harm" in determining whether and how much to award as emotional distress damages.[481]

The Alaska Supreme Court should have remanded and allowed the jury to consider the defendant's culpability,[482] instead of rejecting

480. *See* RESTATEMENT (SECOND) OF TORTS § 222A (AM. L. INST. 1965) ("(1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."); *id.* § 224 cmt. a, cmt. b ("Conversion must be an intentional exercise of dominion or control over the chattel . . . . Thus it is not a conversion negligently to drive into the plaintiff's automobile and wreck it; nor is a bailee a converter when he merely fails to use proper care in keeping the goods entrusted to him, so that they are lost or stolen."). Later Alaskan cases made the court's mistake clear; *cf.* McDowell v. State, 957 P.2d 965, 969 (Alaska 1998) (discussing writ of trespass and trespass on the case in the context of harm to real property).

481. RESTATEMENT (SECOND) OF TORTS § 435B & cmt. a (AM. L. INST. 1965); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM §§ 4, 33(b) (AM. L. INST. 2010). Recently, some scholars have emphasized the important implications of an act's characterization as an intentional tort or a negligent act. *See, e.g.*, Sarah L. Swan, Beltran-Serrano v. City of Tacoma, 16 J. TORT L. 373 (2023); W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 587 (2022). In the property tort context, a critical difference is that a jury is more likely to decide whether the emotional harm is compensable when the pathway is an intentional tort. Although a jury typically decides proximate cause in the negligence context, the judge could find that no reasonable jury would find the emotional harm foreseeable. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 cmt. q (2010). That should not happen in the intentional tort context because responsibility for harm is greater than in the negligence context, and proximate cause is not an element of the tort. DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, THE LAW OF TORTS § 61 (2d ed. Apr. 2025 update). The *Restatement (Third) of Remedies* has expressly changed the decisionmaker, however. *See infra* notes 559–63 and accompanying text.

482. RESTATEMENT OF TORTS § 916 cmt. a (AM. L. INST. 1939) (indicating the measure of damages is a jury issue); RESTATEMENT (SECOND) OF TORTS § 435B cmt. a (1965) (same).

relief because the plaintiffs could not satisfy the elements of IIED.[483] A remand would have allowed a more probing inquiry into the borough's culpability in light of its refusal to allow the dog's retrieval ten minutes before closing the night before, *and* its premature euthanasia of the dog the next day before the owners' return. In addition, in quantifying emotional distress damages, the jury could have also considered the fact that the plaintiffs had only owned the dog for two months before its death,[484] and would have felt some pain anyway at the time of the dog's natural death.[485]

Richardson and Illustration 11 encouraged courts all over the country to use IIED instead of conversion or trespass to chattels as the framework for determining the availability of emotional distress damages, even when the defendant's conduct was *clearly* wrongful.[486] In fact, the subsequent Alaskan case, *Mitchell v. Heinrichs*, involved acts that were not merely negligent. *Mitchell* vividly illustrates the difference in the utility of the two doctrinal paths for recovering damages for emotional harm.[487]

In *Mitchell*, Heinrichs shot several of Mitchell's dogs, including a MacKenzie River husky, when the dogs were running on her property close to the livestock pen.[488] She thought the dogs were "threatening her livestock," and she felt endangered when the husky turned toward her.[489] Mitchell pleaded conversion and IIED, and sought "compensatory damages for the loss of her dog" and her emotional distress, as well as punitive damages.[490] The trial court initially rejected a summary judgment motion for the conversion claim because

483. *Richardson*, 705 P.2d at 456.

484. *Id.* at 455.

485. *See* Sebastien Gay, *Companion Animal Capital*, 17 ANIMAL L. REV. 77, 95 (2010) (advocating for a "companion animal capital model," which would calculate noneconomic damages as "the difference between the pain felt at the death of the companion animal if wrongfully killed and the hypothetical pain felt when the companion animal would have died naturally").

486. *See* Bruce A. Wagman & Jayne M. DeYoung, *Actions Involving Injuries to Animals*, 90 AM. JUR. PROOF OF FACTS 3d 1 § 9 (2024) (noting the growing number of cases that allow recovery for IIED when a companion animal is harmed but the law precludes a property-based claim).

487. Mitchell v. Heinrichs, 27 P.3d 309, 310–14 (Alaska 2001).

488. *Id.* at 310.

489. *Id.* at 310–11.

490. *Id.* at 311.

the defendant potentially had "a less drastic" option for dealing with the "intruder," but the court eventually granted it because the dog had no value to anyone else.[491] It also rejected the IIED claim because the act was not outrageous "in light of the dog's increasingly bold behavior and the threat to the livestock."[492]

The Alaska Supreme Court affirmed the dismissal of the IIED claim, but not the conversion claim.[493] It remanded for trial, mentioning that damages could reflect the pet's value to the owner.[494] It made clear, however, that the value-to-the-owner measure could not include sentimental value or companionship value.[495] In addition, it rejected the availability of parasitic damages for the conversion because the claim for IIED had been unsuccessful.[496]

Not all courts forced plaintiffs to use the IIED framework and forego parasitic damages,[497] but plaintiffs sometimes pleaded IIED even when a conversion claim provided a potentially better outcome. For example, in *Miller v. Peraino*,[498] the dog owner countersued the veterinarian for IIED, alleging the veterinarian beat to death his pet Doberman, Nera, with a pole.[499] This allegedly occurred when the veterinarian could not get the dog to move upstairs after oral surgery.[500] The appellate court affirmed the trial court's dismissal of the IIED counterclaim, noting that "the principal misconduct was focused upon appellants' dog, and not upon appellants themselves," and the dog was not a family member, as required by section 46(2).[501] The court also

491. *Id.* at 312.

492. *Id.*

493. *Id.* at 311–12. The court also affirmed the dismissal of the punitive damage claim. *Id*. at 312.

494. *Id.* at 312, 314.

495. *Id.* at 314.

496. *Id.*

497. *See* Banasczek v. Kowalski, 10 Pa. D. & C.3d 94, 96–97 (Com. Pl. 1979); *cf.* Plotnik v. Meihaus, 146 Cal. Rptr. 3d 585, 603–05 (Ct. App. 2012) (disallowing IIED damages as duplicative of the jury's award of emotional distress damages for trespass to chattels and for contract breach).

498. Miller v. Peraino, 626 A.2d 637, 638–39 (Pa. Super. Ct. 1993).

499. *Id.* at 638.

500. *Id.*

501. *Id.* at 640.

held that "intentional infliction of emotional distress cannot legally be founded upon a veterinarian's behavior toward an animal."[502]

As suggested by *Richardson*, *Mitchell*, and *Miller*, the IIED framework disadvantaged plaintiffs who might otherwise recover emotional distress damages by proving conversion or trespass to chattels. The tort of outrage is "disfavored," and judges are hesitant to allow juries to find liability.[503] Every element of the tort poses a challenge to a plaintiff, especially in this context. It is useful to consider them briefly in turn.

Sometimes the plaintiff cannot prove "severe" emotional distress.[504] As one court said, "Even conceding the bond between many humans and their pets, the burden is one that would be very difficult to meet."[505] Simply, an owner's emotional distress from the loss of a pet, even when serious, might not qualify as severe.

Sometimes the defendant's behavior will not qualify as "extreme and outrageous,"[506] another high bar. Famously, the Institute said that the conduct must be "beyond all possible bounds of decency, and . . . regarded as atrocious, and utterly intolerable in a civilized community."[507] In *Daskalea v. Washington Humane Society*, for example, the local Humane Society was accused of being overly and inappropriately aggressive.[508] It allegedly seized dogs from cars and homes and then either sterilized the animals or demanded payment for major surgery in exchange for the dogs' return, all without procedural

502. *Id.*

503. Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 984 (2008).

504. Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456–57 (Alaska 1985); Lawson v. Pennsylvania SPCA, 124 F. Supp. 3d 394, 409–10 (E.D. Pa. 2015).

505. Oberschlake v. Veterinary Assoc. Animal Hosp., 785 N.E.2d 811, 815 (Ohio Ct. App. 2003).

506. *See* Hayes v. Mirick, 378 F. Supp. 3d 109, 118 (D. Mass. 2019); Repin v. Washington, 392 P.3d 1174, 1185 (Wash. Ct. App. 2017); Damiano v. Lind, No. 29416-1-III, 2011 WL 3719682, at *6–7 (Wash. Ct. App. Aug. 25, 2011); Kyprianides v. Warwick Valley Humane Soc'y, 873 N.Y.S.2d 710, 711 (Ct. App. 2009); Thompson v. Lied Animal Shelter, No. 2:08-cv-00513-RCJ-PAL, 2009 WL 3303733, at *8 (D. Nev. Oct. 14, 2009); Alvarez v. Clasen, 946 So. 2d 181, 184 (La. Ct. App. 2006); Kaiser v. United States, 761 F. Supp. 150, 156 (D.D.C. 1991); Daughen v. Fox, 539 A.2d 858, 864 (Pa. Super. Ct. 1988).

507. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. L. INST. 1965).

508. Daskalea v. Wash. Humane Soc'y, 480 F. Supp. 2d 16, 39 (D.D.C. 2007).

due process.[509] The trial court dismissed the plaintiffs' claim for IIED, stating, "The temporary seizure of an animal, which was conducted in a relatively benign manner . . . does not constitute extreme and outrageous conduct."[510]

A defendant may not intend to cause the plaintiff emotional distress, although recklessness to that result can also suffice.[511] That was the barrier in *Ammon v. Welty*,[512] when a dog warden shot Hair Bear, the family dog, who was "a beloved and devoted pet."[513] A neighbor brought the dog to the warden after the dog wandered onto the neighbor's land.[514] The warden impounded the dog and shot him before the seven-day waiting period lapsed, an allegedly routine occurrence with impounded dogs.[515] The plaintiffs' claim for IIED failed because the dog warden "did not shoot Hair Bear in the presence of the Ammons. As a matter of fact, [the dog warden] had not made positive identification of the dog's owner. There [was] no evidence that [the dog warden] intended to inflict emotional harm on the Ammon family."[516]

In addition to these obstacles, courts sometimes characterize the defendant's act as aimed at a "third party," i.e., the pet.[517] Under the *Second Restatement*, when the defendant's act is not directed at the plaintiff, the plaintiff can only recover if the plaintiff is a "family member" who is "present" or, if the plaintiff is not a family member, if the plaintiff is "present" and suffers emotional distress resulting in "bodily harm."[518] Courts frequently find these requirements are unmet.

509. *Id.* at 18, 29.

510. *Id.* at 39.

511. Lachenman v. Stice, 838 N.E.2d 451, 456–57 (Ind. Ct. App. 2005); Womack v. Von Rardon, 135 P.3d 542, 545 (Wash. Ct. App. 2006).

512. Ammon v. Welty, 113 S.W.3d 185, 188 (Ky. Ct. App. 2002); *see also* Langford v. Emergency Pet Clinic, 644 N.E.2d 1035, 1037 (Ohio Ct. App. 1994).

513. *Ammon*, 113 S.W.3d at 187.

514. *Id.* at 186.

515. *Id.*

516. *Id.* at 187–88. *But see* Gregory v. City of Vallejo, 63 F. Supp. 3d 1171, 1182 (E.D. Cal. 2014) (refusing to grant summary judgment for defendant when plaintiffs alleged that officer shot a friendly dog in presence of owner, knowing owner was in the vicinity).

517. Miller v. Peraino, 626 A.2d 637, 638–39 (Pa. Super. Ct. 1993).

518. RESTATEMENT (SECOND) OF TORTS § 46(2) (AM. L. INST. 1965). The *Third Restatement* now requires the plaintiff to be a close family member and have a

For example, in *Thompson v. Lied Animal Shelter*, a shelter worker gave the owner a certain amount of time to pick up his dog.[519] The plaintiff told the warden that his dog, Zeus, was "all he had, and the only thing close to a child he'd ever had," and that he would make arrangements to retrieve Zeus as soon as possible.[520] Nonetheless, the shelter prematurely euthanized Zeus.[521] In denying the claim for IIED, the judge noted that the euthanasia was outrageous to the dog, not the plaintiff.[522] The plaintiff could not recover because the plaintiff was not a "close relative," defined under state law as one related by "blood or marriage relation," and the euthanasia occurred outside of the plaintiff's presence.[523]

Plaintiffs would fare better if courts considered damages for emotional harm to be parasitic to an intentional tort to property instead of dependent upon proving the tort of IIED.[524] *Brown v. Muhlenberg* is a good example.[525] The dog, a three-year-old Rottweiler named Immi, lived with a family, including young children, and never had "been violent or aggressive towards anyone."[526] Immi wore a bright pink collar "with many tags."[527] The dog wandered out of the plaintiffs' backyard.[528] An officer was driving by, saw her, and called

contemporary awareness of the event. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 cmt. m (AM. L. INST. 2010).

519. Thompson v. Lied Animal Shelter, No. 2:08-cv-00513-RCJ-PAL, 2009 WL 3303733, at *8 (D. Nev. Oct. 14, 2009).

520. *Id.* at *1.

521. *Id.*

522. *Id.* at *7.

523. *Id.* at *8.

524. *See, e.g.*, Bamont v. Pennsylvania SPCA, 163 F. Supp. 3d 138, 155 (E.D. Pa. 2016). There the court found the plaintiff had pleaded a claim for conversion, but not for intentional infliction of emotional distress, when the defendants (the humane society and its officers) failed to return two cats—that were among plaintiff's fifteen pets—for five months despite a court order to do so. When asked why they were seizing the animals, they said, "Because we're the Big Bad Wolf, and we can." *Id.* at 142.

525. Brown v. Muhlenberg Twp., 269 F.3d 205 (3d Cir. 2001).

526. *Id.* at 209.

527. *Id.* at 208.

528. *Id.* at 209.

to her.[529] The dog "barked several times and then withdrew."[530] The officer walked to her and took out his gun to shoot.[531] The owner yelled, "That's my dog, don't shoot!"[532] The officer "hesitated a few seconds," but then fired five shots, four of which occurred after the dog immediately fell and tried to crawl away.[533] This incident allegedly exacerbated the plaintiff's post-traumatic stress disorder, causing the plaintiff to experience nightmares, headaches, and severe anxiety.[534] The Third Circuit reversed entry of summary judgment on the 42 U.S.C. § 1983 claim, as it was predicated on the officer's qualified immunity defense for which there were disputed issues of fact.[535] It remanded the case so that a jury could assess that defense as well as the IIED tort.[536] Given the potential obstacles to a successful IIED claim, the plaintiff would have been advantaged on remand if the plaintiff only had to establish a conversion, some moral culpability, and some emotional harm.[537]

While IIED disadvantages plaintiffs who might otherwise recover damages for loss of the human-pet bond through parasitic damages for conversion or trespass to chattels, IIED advantages plaintiffs if those other paths are unavailable.[538] For example, the Idaho Court of Appeals allowed the IIED claim to proceed in *Gill v. Brown*,[539] a benefit to the plaintiff. There the plaintiffs alleged that the defendant "negligently and recklessly" shot and killed their donkey, who was both "a pet and a pack animal," because the defendant erroneously thought

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.* at 217.

535. *Id.* at 211–12.

536. *Id.* at 219.

537. The appellate court implied that a conversion had occurred when it denied the plaintiff's claim for a violation of procedural due process, saying that a post-deprivation remedy existed. *Id.* at 214.

538. *See, e.g.*, Lawrence v. Stanford, 655 S.W.2d 927, 930–31 (Tenn. 1983) (allowing claim when veterinarian allegedly threatened to kill dog if owner did not pay vet bill).

539. Gill v. Brown, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985).

the donkey was a wild animal.[540] This killing caused the plaintiffs "extreme mental anguish and trauma."[541] The IIED claim advanced notwithstanding the court's comment that the donkey was personal property, and Idaho law disallowed mental distress damages for the tortious destruction of personal property.[542]

But, on balance, section 46 was a problem for pet owners who experienced an intentional tort. It added new hurdles to recovery. In addition, IIED seldom assisted owners whose pets were injured negligently; these plaintiffs typically could not satisfy the tort's strict elements.[543]

In sum, despite cases like *Fredeen*, *Hatahley*, and *La Porte*, the *Second Restatement* undercut plaintiffs' ability to recover parasitic damages for conversion and trespass to chattels. Not only did the *Second Restatement* fail to include these important cases in the Reporter's Notes, but it eliminated language from the black-letter law that suggested the appropriateness of parasitic damages for intentional torts, and it channeled claims into the tough IIED framework.

D. The Restatement (Third) of Torts

The *Third Restatement* is the current iteration of the ALI's torts project. It is a series of discrete publications on different topics. The *Restatement (Third) of Torts: Liability for Physical & Emotional Harm* was published in several installments from 2010 to 2012 and contains the substantive rules about liability for emotional harm. Its Reporters were Michael Green and William Powers, and also Gary Schwartz until his untimely death.[544] The *Restatement (Third) of Torts: Remedies* houses the damage rules related to emotional harm. That publication

540. *Id.* at 1278. Mr. Bradford Eidam, a lawyer on the case, recalled that the donkey was shot by the defendant who had been drinking at the local bar and mistook the animal for wildlife. The trial judge sua sponte dismissed the claim for negligent infliction of emotional distress. Telephone conversation with Merle H. Weiner (Sept. 11, 2023).

541. *Gill*, 695 P.2d at 1278.

542. *Id.* at 1277.

543. *See, e.g.*, Lachenman v. Stice, 838 N.E.2d 451, 457 (Ind. Ct. App. 2005); Fackler v. Genetzky, 595 N.W.2d 884, 892 (Neb. 1999) (disallowing the IIED claim when the act harming the pet occurred negligently).

544. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM preface (AM. L. INST. 2010).

is currently being drafted, although the ALI membership has already approved some of its sections. The Reporters are Douglas Laycock and Rick Hasen.[545]

Like previous iterations of the *Restatement*, the *Third Restatement* classifies pets as property.[546] It is full of illustrations and commentary involving animals.[547] It continues to address the topic of the loss of the human-pet bond in a fragmented way,[548] including by separating pet cases into two categories depending upon whether the pet was intentionally or negligently injured.[549] It has erected new obstacles to recovery for emotional distress when a defendant negligently injures or kills a pet: it explicitly prohibits pet owners, in particular, from utilizing the tort of negligent infliction of emotional distress in some contexts.[550] My companion article, *Reconsidering*

545. *Restatement of the Law Third, Torts: Remedies*, AM. L. INST., https://media.ali.org/annual-meeting/restatement-of-the-law-third-torts-remedies (last visited Apr. 14, 2025).

546. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. m (2010) (discussing pets as "property" in the context of negligent infliction of emotional distress).

547. *See, e.g.*, *id.* §§ 42 illus. 3, 46 cmt. d, 47 cmt. m; RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 illus. 2 (AM. L. INST., Tentative Draft No. 2, 2023); *cf.* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 45 illus. 8 (AM. L. INST., Tentative Draft No. 6, 2021).

548. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM §§ 46, 47 (AM. L. INST. 2012); RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 (AM. L. INST., Tentative Draft No. 2, 2023); RESTATEMENT (FOURTH) OF PROP. vol. 2, div. 1 (AM. L. INST., Tentative Draft No. 4, 2023).

549. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 (AM. L. INST., Tentative Draft No. 2, 2023). The scope of liability for intentional torts is wider than for negligently inflicted torts; *see* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM §§ 33(b) cmt. b, cmt. e (AM. L. INST. 2010); *see also* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. m (AM. L. INST. 2012).

550. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. m (AM. L. INST. 2012) (Negligent Conduct Directly Inflicting Emotional Harm on Another) ("*Property damage.* Recovery for emotional harm resulting from negligently caused harm to personal property is not permitted under this Section. Emotional harm due to harm to personal property is insufficiently frequent or significant to justify a tort remedy. While pets are often quite different from other chattels in terms of emotional attachment, an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner. This rule against liability for emotional harm secondary to injury to a pet limits the liability of veterinarians in the event of malpractice and serves to make veterinary services more

Negligent Infliction of Emotional Distress for Loss or Injury to a Pet,[551] criticizes that position.

1. Parasitic Mental Distress Damages for Intentional Torts to Property

For intentional torts to property, the *Third Restatement* makes clear that recovery for emotional harm is sometimes appropriate. In 2023, the Institute approved section 21 of the *Restatement (Third) of Torts: Remedies*. That section, entitled *Emotional Harm Unaccompanied by Bodily Harm to the Plaintiff (Emotional Distress)*, says that emotional distress damages are recoverable, even if not accompanied by bodily harm, when they "result[] from an intentional tort that is principally directed at property rights or financial interests, committed under circumstances in which emotional harm is especially likely to result . . . ."[552] The section says it "applies to intentional torts such as trespass to land, trespass to chattels, conversion, fraud, and interference with contract."[553]

This welcome provision clarifies the availability of parasitic damages for loss of the human-pet bond from an intentional property tort.[554] As the commentary to section 21 says, the *Third Restatement* "explicitly states for the first time in the black letter of any Restatement a general rule for the availability of damages for emotional harm in intentional tort cases other than intentional infliction of emotional

readily available for pets. Although harm to pets (and chattels with sentimental value) can cause real and serious emotional harm in some cases, lines—arbitrary at times—that limit recovery for emotional harm are necessary. Indeed, injury to a close personal friend may cause serious emotional harm, but that harm is similarly not recoverable under this Chapter. However, recovery for *intentionally* inflicted emotional harm is not barred when the defendant's method of inflicting harm is by means of causing harm to property, including an animal.") (emphasis added in part).

551. Weiner, *supra* note 13.

552. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21(a)(3) (AM. L. INST., Tentative Draft No. 2, 2023).

553. *Id.* § 21(b).

554. However, the *Restatement* continues to express considerable hostility to emotional distress damages for negligent injury to property. *Id.* § 21 cmt. c, illus. 2; *Id.* reporters' note b.

distress."[555] Illustration 2 involves a pet and is based on the case of *Plotnick v. Meihaus*, discussed earlier.[556]

> Ken and Bethany were neighbors who had disputes beginning soon after Bethany moved into the neighborhood. One day Bethany's dog Romeo got loose and got into Ken's yard. Ken beat the dog with a baseball bat. Bethany sued Ken, alleging both that Ken negligently hit Romeo and that Ken committed trespass to chattels by deliberately hitting Romeo. The jury awarded $2,600 for veterinary expenses connected to Romeo's injuries, $20,000 for emotional distress for the trespass to chattels, and another $16,000 for emotional distress on the negligence claim. The court held that in this jurisdiction, emotional-distress damages were available for intentionally harming a pet under the trespass-to-chattels claim but not under the negligence claim.[557]

Importantly, section 21 does not require that the plaintiff's distress be severe or serious. The commentary even suggests that a plaintiff could recover for transient emotional harm.[558]

Section 21 is a major improvement in clarity with respect to the availability of parasitic damages for an intentional tort involving a pet.

2. The Judge's Role, the Law of Liability, and a Pet's Value

Nonetheless, there are at least three reasons why section 21 may not make a difference for judges who are reluctant to allow recovery

555. *Id.* § 21 cmt. a; *see also id.* § 22 reporters' note c.

556. *See supra* notes 425–31 and accompanying text.

557. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21, illus. 2 (AM. L. INST., Tentative Draft No. 2, 2023). By citing a court, the illustration is unusual for *Restatement* illustrations. The quotation in text omits additional parts of the illustration that describe the case. The illustration was based on Plotnick v. Meihaus, 146 Cal. Rptr. 3d 585 (Ct. App. 2012). *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 reporters' note c (AM. L. INST., Tentative Draft No. 2, 2023).

558. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. d, cmt. e (AM. L. INST., Tentative Draft No. 2, 2023).

for emotional harm in this context. First, section 21(a)(3) provides that the judge, not the jury, will decide whether the intentional tort was "committed under circumstances in which emotional harm is especially likely to result."[559] That determination turns on "the nature of the plaintiff's relationship to the property" and "the egregiousness of defendant's actions."[560] These factors harken back to section 916 of the *First Restatement* and section 435B of the *Second Restatement*,[561] and also find expression in the scope of liability section of the *Third Restatement*.[562] The difference, however, is that these other sections allocate the decision to the jury, not the judge.[563] In short, section 21 of the *Third Restatement* treats the availability of damages for mental harm more like a question of duty rather than proximate cause. It gives judges enormous power to strike such relief.

In exercising their gatekeeping function, judges will have to determine whether the relationship between the plaintiff and the pet is strong enough, and whether the defendant's behavior is egregiousness enough, to send the damage question to the jury.[564] Admittedly, the *Third Restatement* has helpful commentary that may convince a judge not to strike a request for relief: "[I]f the 'trespass' consists of beating a pet with a baseball bat, the pet owner's emotional distress is an entirely foreseeable reaction and should be compensable."[565] Nonetheless, judges may be more negatively influenced than juries by the historic hostility to damages for emotional harm in the property tort context. A judge who is disinclined to allow relief will also find support for that position in the *Third Restatement*'s section on IIED.[566]

559. *Id*. § 21(a)(3).

560. *Id.* § 21 cmt. f.

561. *See supra* text accompanying notes 291, 464.

562. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 33 cmt. b (AM. L. INST. 2010) (Scope of Liability for Intentional and Reckless Tortfeasors); *see id.* § 33 cmt. g (suggesting this section applies to "physical harm" and not standalone emotional distress). "Physical harm" includes "property damage." *Id.* § 4.

563. *See supra* note 482; *see also* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 cmt. q (2010).

564. *See supra* notes 559–60 and accompanying text.

565. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. f (AM. L. INST., Tentative Draft No. 2, 2023).

566. *See infra* text accompanying notes 572–79.

The commentary to section 21 explains and justifies its allocation of decision-making authority to the judge, but the reasons are not compelling. It references similar decision-making allocations in other sections,[567] and specifically cites comment g of section 47 in the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*.[568] Comment g, in turn, cites section 7(b) of the same publication. Section 7(b) says that a judge "[i]n exceptional cases" can alter the duty of reasonable care for certain categories of cases for reasons of policy.[569] Of course, the question of parasitic damages in an intentional tort case is not the same as the question of duty in a negligence case. A judge is not making a policy pronouncement for an entire category of cases. Rather, after an intentional tort, the question is whether the defendant's conduct in a particular case is sufficiently culpable to justify damages for emotional harm in light of all the circumstances. Commentary to section 21 of the *Restatement (Third) of Torts: Remedies* defends the judicial gatekeeping role because otherwise too many "marginal or speculative cases" might be submitted to the jury.[570] That rationale is unconvincing because these cases can always get to the jury regardless of the availability of emotional distress damages: the plaintiff has a claim for the property damage.

It is unfortunate that section 21 allocates the "evaluative judgment" to the judge, for it is akin to other evaluative judgments that juries typically make in tort cases.[571] Judges, of course, should have the responsibility to ensure that the defendant's act was not committed innocently; in such a case, no reasonable jury could find the situation appropriate for mental distress damages. But once there is evidence of moral culpability, a judge should send the case to the jury to determine

567. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. f (AM. L. INST., Tentative Draft No. 2, 2023) (referencing RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47(b) and RESTATEMENT (SECOND) OF TORTS § 774A)).

568. *See id.*

569. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7(b) (2010).

570. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. f (AM. L. INST., Tentative Draft No. 2, 2023).

571. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 cmt. f (AM. L. INST. 2010).

if emotional damages are warranted and in what amount. This approach better aligns with the jury's traditional role in assessing damages as well as tort law's objective of providing make-whole relief. Unfortunately, however, section 21 suggests a more expansive judicial role.

Second, section 21 may not influence judges who are reluctant to allow recovery for emotional harm in pet cases because the substantive law provisions in other volumes of the *Third Restatement* undercut any advantage section 21 provides to plaintiffs. Section 21 is not meant to alter the substantive law.[572] Consequently, section 46 on IIED is still a barrier.[573] While the *Third Restatement* thankfully omits the *Second Restatement*'s problematic Illustration 11,[574] the *Third Restatement* continues to funnel cases into the IIED framework through its commentary and Reporters' Notes. In fact, the *Third Restatement*'s commentary uses "torturing or maliciously killing another's pet" as an example of what could qualify as extreme and outrage conduct.[575] Relatedly, the Reporters' Notes cite *La Porte v. Associated Independents, Inc.* as a case "discussing the factors that bear on whether an actor's conduct is extreme and outrageous."[576] However, *La Porte* did *not* involve a claim for IIED but held that emotional distress damages could be parasitic to the intentional tort.[577] By citing *La Porte* as authority for the factors that bear on the element of extreme and outrageous conduct, the *Third Restatement* suggests that similar cases should be analyzed using IIED.

572. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. c (AM. L. INST., Tentative Draft No. 2, 2023).

573. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (2012).

574. *See supra* note 451 and accompanying text (reproducing illustration involving the shooting of a pet dog that stated liability for IIED would exist).

575. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 cmt. d (2012).

576. *Id.* § 46 reporters' note cmt. d. (citing La Porte v. Associated Indeps., Inc., 163 So. 2d 267 (Fla. 1964)). The Reporters' Note also cites cases in which the theory for recovery was intentional infliction of emotional distress. *Id.* (first citing Gill v. Brown, 695 P.2d 1276 (Idaho Ct. App. 1985); then citing Burgess v. Taylor, 44 S.W.3d 806 (Ky. Ct. App. 2001)).

577. *See La Porte*, 163 So. 2d at 269.

The Reporters' Notes also devote over a paragraph to contrasting the claims of "malicious harm to pets" and IIED,[578] again suggesting that IIED is the better approach. The Reporter specifically critiques *Womack v. Von Rardon*, the case in which the appellate court had allowed recovery for emotional distress but relied on the tort of malicious harm to a pet instead of IIED.[579] The Reporter calls *Womack* "a confusing precedent."[580]

To the contrary, *Womack* is not confusing at all when read in historical context. *Womack*, discussed above,[581] involved three teenagers who doused a cat with gasoline and set it on fire. The appellate court affirmed a $5,000 award for emotional harm. *Womack* was consistent with cases in which courts viewed emotional distress damages as parasitic to conversion so long as there was sufficient evidence of moral blame. The *Womack* court expressly said that maliciousness can "be considered a factor in measuring a person's emotional distress damages."[582] The court also found its approach consistent "with actual and intrinsic value concepts . . . because . . . harm may be caused to a person's emotional well-being by malicious injury to that person's pet as personal property."[583] That statement was true: courts at early common law sometimes allowed the value-to-the-owner measure to capture the owner's love for the pet when the defendant's acts were sufficiently blameworthy.[584]

Perhaps the Reporter found confusing the fact that the appellate court affirmed both the award for emotional distress damages and summary judgment for the IIED claim. With regard to the IIED claim, the *Womack* court noted that the trial court could have found either the "lack of intent [or] insufficient severity of emotional harm."[585] Either

578. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 reporters' note cmt. d (2012).

579. Womack v. Von Rardon, 135 P.3d 542, 546 (Wash. Ct. App. 2006).

580. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 reporters' note cmt. d (2012).

581. *See supra* notes 432–40 and accompanying text (discussing *Womack*).

582. *Womack*, 135 P.3d at 546.

583. *Id.* (citation omitted).

584. *See supra* notes 80–94, 98–100, 104–20 and accompanying text (discussing cases). *Cf. supra* note 24 (citing modern cases).

585. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 cmt. d (2012).

possibility would still have been consistent with an award of emotional distress damages for malicious conversion. IIED requires intent or recklessness to inflict severe emotional distress,[586] something that a malicious conversion does not require. For conversion, the defendant must intend to exercise dominion or control over the chattel but need not intend the emotional distress.[587] For instance, a defendant might hate a neighborhood cat for caterwauling after midnight and decide to kill the animal. The defendant may lack the intent to cause the owner emotional distress, and may not even be reckless in causing that result if the defendant reasonably believed the cat was feral. But the killing would still be a conversion.[588] The defendant's good faith might affect whether the plaintiff could obtain damages for emotional harm,[589] but that was not an issue in *Womack*. In addition, the plaintiff need not prove severe emotional distress to receive compensation for conversion, unlike for IIED.

Perhaps the Reporter was troubled by the apparent inconsistency between the court's unwillingness to sanction the IIED claim and its willingness to approve the "new" claim for emotional harm arising from malicious injury to a pet.[590] The Reporter called the new tort "a somewhat broader remedy for pet owners" than the tort of outrage.[591] But the claim was not "new," nor was it a "separate . . . claim for emotional harm."[592] Rather, allowing recovery for malicious injury to a pet is simply a conversion claim with parasitic damages. The availability of parasitic damages for conversion has always been a broader remedy than IIED, and appropriately so. The conversion claim is not a standalone claim for emotional harm. And since IIED is a gap filler,[593] a defendant who commits a conversion with moral approbation

586. *Id.* § 46 cmt. h.

587. RESTATEMENT (SECOND) OF TORTS § 222A (AM. L. INST. 1965).

588. *Id.* §§ 222A, 244.

589. *See* RESTATEMENT OF TORTS § 916 (1939); RESTATEMENT (SECOND) OF TORTS § 435B (1965); *cf.* RESTATEMENT (SECOND) OF TORTS § 922 (1979) (allowing diminution of damages if the chattel is returned and, *inter alia*, it was converted in good faith and under a reasonable mistake).

590. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 cmt. d (2012).

591. *Id.*

592. *Id.*

593. *See supra* note 447 and accompanying text.

should not be protected by the plaintiff's inability to satisfy the elements of IIED.

Third, and finally, section 21 may never make a difference if the *Third Restatement*'s section 29[594]—the forthcoming section on value––simply repeats the language about value from section 911 of the *Second Restatement*. That would continue to cause confusion. Rather, section 29 needs to explain how and why parasitic damages are possible, assuming the section on value continues to apply to cases of conversion[595] and the value-to-the-owner measure continues to exclude sentimental value.[596] An explanation is offered below for potential inclusion in the commentary.[597]

Despite these obstacles to the potential impact of section 21, section 21 affords an important opportunity for courts to reconsider their opposition to parasitic damages for an intentional tort involving a pet. As explained in this Article, the law has unfortunately gotten off track. Parasitic damages are good policy, and the jury, not the judge, should determine whether damages for emotional harm are appropriate, assuming circumstances of aggravation exist. Judges who reexamine the issue will hopefully be influenced by this Article's analysis.

IV. LESSONS LEARNED AND NEW DIRECTIONS

The foregoing material prompts a few concluding observations about the ALI's *Restatement of Torts* (in all of its iterations) and the provisions still to be drafted.

A. Assessing the ALI's Achievement of Its Goals

Scholars and judges have long debated the purpose of the *Restatements of the Law*.[598] Are they meant to be descriptive (and

594. RESTATEMENT (THIRD) OF TORTS: REMEDIES, Memorandum & Black Letter of Sections Approved by Membership (AM. L. INST., Tentative Draft No. 3, 2024).

595. *See supra* notes 301, 340 and accompanying text.

596. *See supra* notes 307–11, 340 and accompanying text.

597. *See infra* notes 605–23 and accompanying text.

598. *See* Wade, *supra* note 319, at 68; Balganesh, *supra* note 320, at 2141 ("Restatements are . . . neither purely descriptive, nor entirely normative."); *see* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859,

thereby "clarif[y] and simplif[y] . . . the law"), innovative (and thereby "promote . . . its better adaptation to social needs"), or both?[599] In the context of recovery for loss of the human-pet bond, all iterations of the *Restatement of Torts* have struggled to achieve either objective.

In terms of the simplification and clarification of the law, neither the *First* nor the *Second Restatement* straightforwardly answered the question whether an owner could recover for the loss of the human-pet bond after a pet was intentionally harmed. The opacity undoubtedly explains why today the law for recovery of emotional harm "is not well settled . . . for these intentional torts aimed principally at interests in property," and "[t]here are a variety of tests among the states, and there appears to be no majority rule."[600] Although the *Third Restatement* has finally answered the question whether emotional distress damages are available, section 21 leaves unanswered whether courts should allow parasitic damages for an intentional tort involving a pet or should require the plaintiff to prove IIED. Authority exists for both approaches. Because these are not cases of "standalone emotional harm," and IIED erects unreasonably high hurdles to recovery in cases in which the defendant's wrongdoing can be pronounced, the Institute should have expressly favored the former approach. But it has not done so.

Nor has the *First*, *Second*, or *Third Restatement* been innovative with respect to adapting the law to social needs. In 1906, Professor Charles McCormick identified the problematic trend that some courts were starting to deny recovery "for loss of the companionship of a favorite dog."[601] Since 1906, pet ownership has skyrocketed and more people than ever have meaningful relationships with their pets.[602]

866–67 (1996) (suggesting a Restatement should "reflect[] what is happening in the courts"); W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 29 (1985) (criticizing the Institute for remaking the law in a wide variety of Restatement projects).

599. *Certificate of Incorporation*, *supra* note 12.

600. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. f (AM. L. INST., Tentative Draft No. 2, 2023).

601. MCCORMICK, *supra* note 153 and accompanying text.

602. *See* Harriet Ritvo, *The Emergence of Modern Pet-Keeping*, *in* SOCIAL CREATURES: A HUMAN & ANIMAL STUDIES READER 96, 99 (Clifton P. Flynn ed., 2008) (tracing pet keeping back to the 1800s); Harold A. Herzog, *Biology, Culture, and Origins of Pet-Keeping*, 1 ANIMAL BEHAV. & COGNITION 298, 300–01 (2014) (noting the rise in the importance of companion animals to Americans from 1947

Science has recognized the importance of the human-pet bond.[603] The *Restatement of Torts*, however, has been slow to adapt to this reality, and, in some respects, has been outright hostile to pet owners' recovery for loss of the human-pet bond.[604]

Overall, and with the advantage of hindsight, this Article illustrates that the Institute has not always produced the gold-standard product it hoped to achieve. Nonetheless, the Reporters and the Institute deserve considerable grace. The *Restatement* is a huge endeavor that provides enormous assistance to courts and lawyers. It is an intellectual tour de force. And, to repeat a well-known idiom, "Hindsight is 20/20." This Article merely confirms the importance of independent analyses by litigators, judges, and scholars of particular issues in tort law.

B. Furthering the ALI's Goals

Some opportunities currently exist for the ALI to further clarify and simplify the law and/or advance the best law. In particular, the Reporters to the Remedies volume still have to draft section 29 on value

through 2000 by use of the word "pet" in published books in the U.S.); Julie K. Shaw & Sarah Lahrman, *The Human-Animal Bond—A Brief Look at Its Richness and Complexities*, *in* CANINE & FELINE BEHAVIOR FOR VETERINARY TECHNICIANS & NURSES 70, 71 (Debbie Martin & Julie K. Shaw eds., 2d ed. 2023) (noting the role of the companion animal "has changed from that of a working animal to that of a valued family member"). Admittedly, not all people love their pets like family members. Many people do not regard their pets as family. Jessica Pierce, *Are Pets Really Family?*, PSYCH. TODAY, https://www.psychologytoday.com/us/blog/all-dogs-go-heaven/201510/are-pets-really-family. People's feelings toward their pets can also shift over time. As one commentator observed, "when we tire of them or they create tension in a family or we are moving house, they are demoted to 'just a dog.'" *Id.* ("Ethnographic research shows us just how tenuous human-animal bonds can be. Maybe the relationship becomes strained by what the human perceives as 'behavioral problems' in the animal, or maybe there are changes in the human's situation (divorce, illness, loss of job, new baby) which that [sic] make the animal's presence inconvenient. Either way, the animal is often simply ejected from the family system."). This may be relevant in an individual case for purposes of proving damages, but it is not relevant for purposes of determining the overall social importance of pet ownership today.

603. *See generally* Hines, *supra* note 124; Walsh, *supra* note 3.

604. *See supra* notes 550–51 and accompanying text.

and the Reporters to the *Restatement (Fourth) of Property* still have to draft sections on the torts of conversion and trespass to chattels.[605]

The following three issues should be addressed in the commentary to one or more of these sections. First, the commentary to section 29 should expressly acknowledge the overlap between parasitic damages and the value-to-the-owner measure. In doing so, it should state that "sentimental value" is not recoverable even in pet cases. It should then elaborate on the reason: otherwise, the damages rules would circumvent the substantive law of liability. Because emotional damages are not permissible as parasitic damages when a defendant negligently injures property, the value-to-the-owner measure should not allow recovery for the sentimental value of pets. In contrast, since emotional damages are permissible as parasitic damages after an intentional tort to property, a plaintiff with such a claim need not, and should not, recover sentimental value through the value-to-the-owner measure. That would constitute duplicative recovery and is expressly prohibited.[606]

Second, the commentary to section 29 should also explain why the underlying tort matters to pet owners' recovery. The Institute has become much more willing to elaborate on its policy choices since the *First Restatement*,[607] and it should do so in this context. Otherwise, courts may think the prohibition on damages for sentimental value also applies to intentional torts and prohibits parasitic damages. It will help avoid confusion to provide a fuller explanation of why that is not true.

605. The *Third Restatement of Torts* has avoided the topics of conversion and trespass to chattels over the years. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS scope note (AM. L. INST., Discussion Draft, 2014) (mentioning conversion and trespass to chattels might be addressed by the project on Liability for Economic Harm); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS scope note (AM. L. INST., Tentative Draft No. 1, 2015) (mentioning conversion and trespass to chattels are "likely" to be covered in a future project that "will consider tort doctrines relating to interests in land and water"). It appears that the RESTATEMENT (FOURTH) PROPERTY will address these topics. *See* RESTATEMENT (FOURTH) PROPERTY § 3.4, ch. 4 (AM. L. INST., Tentative Draft No. 4, 2023) (Section 3.4 Extent of Liability for Conversion and Chapter 4 addressing Property Torts and Remedies).

606. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 3(a) (AM. L. INST., Tentative Draft No. 1, 2022).

607. *See* Hans Linde, *Courts and Torts: "Public Policy" with Public Politics?*, 28 VAL. U. L. REV. 821, 841 (1994).

The explanation is well known but bears repeating. Defendants who commit intentional torts have always been held responsible for more consequences than the negligent tortfeasor, including for those consequences that could not have been reasonably foreseen. Simply, "it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim."[608] But the same reasoning does not apply in cases of negligence. In general, "responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent or is not at fault."[609] This principle is clear in the *Third Restatement* in its provision on legal causation.[610] It is also relevant to remedies, however, and reflects what the Institute calls the murky line between remedies and substantive claims.[611] Both the *Second* and *Third Restatement* emphasize the importance of legal causation to the issue of remedies,[612] but more attention to the interrelationship of remedies and legal causation in the context of pet owners' emotional harm would answer a lot of questions.

To this end, the commentary may want to remind readers that a plaintiff is not entitled to parasitic damages for emotional harm in other contexts when the defendant's negligent conduct does not cause physical injury. The *Third Restatement* provides a list of examples, including the plaintiff who observes a negligent driver hitting the plaintiff's good friend, the plaintiff whose professor loses the student's exam before grading, and the plaintiff who "fears future disease

608. ROBERT E. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 40 (W. Page Keeton ed., 5th ed. 1984). *See* Ralph D. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 593–96 (1933) (discussing "the desire to be more severe with the person seriously at fault in the moral sense").

609. RESTATEMENT (SECOND) OF TORTS § 435B cmt. a (AM. L. INST. 1965); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 33 cmt. e (AM. L. INST. 2010).

610. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 33 cmt. e (2010).

611. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 reporters' note c (AM. L. INST., Tentative Draft No. 2, 2023).

612. RESTATEMENT (SECOND) OF TORTS § 917 (AM. L. INST. 1979); RESTATEMENT (THIRD) OF TORTS: REMEDIES § 6 (AM. L. INST., Tentative Draft No. 1, 2022).

following exposure to a toxic chemical."[613] The outcome is the same for a plaintiff whose pet is negligently injured. In these negligence cases, the plaintiff must satisfy the tort of negligent infliction of emotional distress ("NIED"), which can sometimes provide relief without risking "indeterminate and excessive liability."[614] Unfortunately, the *Third Restatement* treats pet owners unfairly with respect to the availability of the NIED claim,[615] but at least its misguided approach reinforces the point that intentional and negligent acts have different legal implications. At a minimum, the commentary to section 29 should cross reference the relevant liability provisions that contextualize the damage rules.[616]

Third, the Institute should acknowledge that some cases for emotional harm fall outside the strict dichotomy between negligence and intentional torts. In particular, there should be an explanation of how gross negligence fits into the rule structure. The commentary might reference the *Third Restatement*'s recognition that recklessness is relevant to emotional distress damages in the context of physical harm to property.[617] But the discussion should go further because cases of gross negligence differ from cases of reckless conduct.[618] Courts at early common law sometimes recognized that an owner was entitled to damages for emotional harm when a pet was injured by the defendant's gross negligence.[619] Courts today sometimes also acknowledge gross negligence matters to recovery,[620] although many do not.[621] As the

613. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. b.

614. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. b (AM. L. INST., 2012).

615. *See id.* cmt. m; *see also* Weiner, *supra* note 13 (criticizing the *Third Restatement*'s treatment of negligent infliction of emotional distress for pet owners).

616. The commentary to section 21 briefly mentions the fact that pet owners cannot recover for the negligence of veterinarians. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. b (AM. L. INST., Tentative Draft No. 2, 2023).

617. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §§ 4, 33(b) (AM. L. INST. 2010).

618. *Id.* § 2 cmt. a.

619. *See supra* notes 226–29, 255–57 and accompanying text.

620. Johnson v. Wander, 592 So. 2d 1225, 1225 (Fla. Ct. App. 1992); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Ct. App. 1978).

621. *See, e.g.*, Brooks v. Jenkins, 104 A.3d 899, 921 (Md. Ct. Spec. App. 2014) (holding that emotional distress damages on the common law trespass claim were unavailable despite gross negligence because "a plaintiff must show an intent, i.e., an

Third Restatement says in its remedies volume, "The goal of restoring plaintiffs to their rightful positions is a valuable guide to interpretation of specific damage rules in novel or ambiguous situations."[622] Arguably cases of gross negligence are an ambiguous situation. While the commentary to section 21 could have addressed this topic, that section is now complete. The commentary to the forthcoming sections on conversion and trespass to chattels in the *Restatement (Fourth) of Property* may now be the most logical alternative for this discussion.

The *Restatement (Fourth) of Property* also provides the best opportunity in the foreseeable future for the Institute to address some other issues that are ripe for analysis, although the Reporters may prefer instead to tee up the issues for the *Restatement (Fourth) of Torts*. These issues include the relationship between IIED and the intentional torts to property as well as the proper decision maker for determining whether an intentional tort to property was committed under circumstances that made emotional harm especially likely to result.[623] At a minimum, the *Restatement (Fourth) of Property* should cross-reference the relevant discussion in the *Restatement (Third) of Torts* on some of the topics raised in this Article.

intent to deceive or an intent to harm, rather than negligence or something 'more akin to reckless conduct,'" and evidence in case did not qualify); Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 562 (Tex. Ct. App. 2004) ("Schuster asserts at most gross negligence . . . . [G]rossly negligent property damage can support a claim for mental anguish only where there is evidence of some ill-will, animus, or desire to harm the plaintiff personally . . . . There is no such evidence here."); Anne Arundel Cnty. v. Reeves, 252 A.3d 921, 940–41 (Md. App. Ct. 2021). *See generally* Christopher Green, Comment, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 191–92 (2004) (describing cases of veterinary gross negligence where recovery for emotional harm was denied). *Cf.* Harabes v. Barkery, Inc., 791 A.2d 1142, 1143, 1146 (N.J. Sup. Ct. 2001) (rejecting the availability of damages for mental distress and loss of companionship for death of pet dog, Gabby, who was allegedly negligently subjected to extreme heat for ten hours at dog groomers and noting that emotional distress is not available under Wrongful Death statute for loss of a child or spouse).

622. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 2 cmt. e (AM. L. INST., Tentative Draft No. 1, 2022).

623. *See supra* notes 559–93 and accompanying text.

V. CONCLUSION

The history of recovery for loss of the human-pet bond in the *Restatement of Torts* shows just how difficult it is to achieve the gold standard to which the Institute aspires. The occasionally convoluted treatment of the topic explains why some plaintiffs, including Shadow's owners,[624] have had so much trouble recovering for their emotional harm. It took three iterations of the *Restatement of Torts* to provide a clear answer to the simple question of whether a plaintiff can recover for loss of the human-pet bond when the defendant intentionally injures the plaintiff's pet. Despite the clarity with which that question is now answered, other questions remain. This Article may inform the answers to these other questions.

624. *See supra* notes 51–65 and accompanying text.